Dream Property Sdn Bhd v Atlas Housing Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — APPEAL NO 02(f)-13–02 OF 2014 (J)

RAUS SHARIF PCA, AHMAD MAAROP, HASAN LAH, RAMLY ALI AND AZAHAR MOHAMED FCJJ

12 FEBRUARY 2015

Contract — Restitution — Unjust enrichment — Buyer of land failed to pay balance purchase price under sale and purchase agreement ('SPA') — Buyer allowed to, and did, build shopping mall on land — Mall became thriving business centre — Buyer's failure to pay balance purchase price automatically terminated SPA and rendered it null and void — Whether vendor had to restitute buyer for market value of mall upon retaking vacant possession of land — Whether insufficient for vendor being unjustly enriched at buyer's expense to merely pay buyer costs of building mall — Whether buyer required to pay vendor market rent for occupation of unimproved land until date of judgment — Whether buyer not required to pay profits for use and occupation of land as buyer was not trespasser nor had fiduciary relationship with vendor — Whether 'automatic termination' clause in SPA valid and enforceable and did not offend s 40 of the Contracts Act 1950 as parties had agreed to waive requirement for giving notice of termination in event of breach

The appellant entered into a sale and purchase agreement ('the SPA') on 19 November 2004 to buy the respondent's land for RM33.5m to build a commercial complex. The SPA, upon its execution, allowed the appellant immediate access to the land and the right to commence construction works. The respondent also granted the appellant a power of attorney ('the PA') to enable it to deal with the land as if it was its owner. The SPA required the respondent to hand over vacant possession of the land to the appellant after it had evicted squatters from, and relocated a school on, the land and from the date of handing over of vacant possession, the appellant had four months (with an automatic extension of two months with payment of interest) to pay the balance purchase price. The appellant paid the 10% deposit under the SPA, entered upon the land and began development works, completing the construction of a shopping mall at a cost of RM124m within two years of the signing of the SPA. The mall became a thriving business centre and by the end of 2007 its market value was about RM387m. Despite a dispute and a court case between the parties over when vacant possession of the land had been handed over and the appellant's failure to pay the balance purchase price within the stipulated time frame, the construction of the mall went on unhindered. The respondent neither revoked the PA nor applied for an injunction to stop the construction. As for the dispute over the date of handing over of vacant

possession, the respondent contended it was 21 November 2005 when representatives of both parties jointly inspected the land and the appellant's representative wrote a note at the site saying he was satisfied 'the school administration had been relocated' (the land was cleared of squatters much earlier). Following the joint inspection, the respondent informed the appellant that with the handing over of the land, the completion date of the SPA would be 21 March 2006 and the interest-bearing two-month extended completion date would be 21 May 2006. The appellant, on the other hand, was of the view the handing-over date was 28 February 2006 when the respondent handed over to it the keys to the school's gates and premises. As the respondent failed to receive the balance purchase price even after three months of the extended completion date, it notified the appellant that the 10% deposit had been forfeited and, pursuant to cl 12 of the SPA, the agreement automatically became null and void. The respondent demanded the appellant redeliver vacant possession of the land and it sued the appellant for the same in the High Court in late August 2006. In its counterclaim, the appellant, inter alia, sought, in the event the SPA was held to be validly terminated, to be restituted for the prevailing market value of the mall arguing that the respondent would be unjustly enriched at the appellant's expense if it could inherit the thriving commercial complex which was the mall, just by paying for the costs of its construction. The High Court declared, inter alia, that the appellant had breached the SPA by failing to pay the balance purchase price by the extended completion date of 21 May 2006; that the respondent was entitled to forfeit the deposit and that by cl 12 of the SPA the agreement automatically became null and void. The appellant was ordered to return vacant possession of the land and also to pay the respondent all income and profits it had received from sales and rents on the land as assessed by the registrar on the premise the appellant had become a constructive trustee. The court also ordered the respondent to pay the appellant the costs of construction of the mall as assessed by the registrar. The majority of the Court of Appeal ('the COA') upheld the High Court's decision but with regard to the trial court's order on account of profits, the COA ordered that the appellant was only required to pay profits it had derived from use and occupation of the land as assessed by the registrar. The COA also ruled that it would not be right to restitute the appellant for the market value of the mall as that would be conferring a benefit to the appellant, which was the contract-breaker, by way of appreciation in the market value of the land. In the instant appeal, the appellant argued that the courts below were wrong in their conclusions on the date of handing-over of vacant possession of the land; on the proper measure of restitution the appellant was entitled to, and also in ordering the appellant to pay profits for use and occupation of the land. In addition, the appellant contended that: (i) cl 12 of the SPA providing for 'automatic termination' of the SPA was void and unenforceable in view of s 40 of the Contracts Act 1950 under which the respondent was required to have given notice of termination of the SPA; and (ii) the respondent's alleged acceptance of RM5.15m paid by the appellant towards settlement of the

purchase price long after the completion dates had expired amounted to a 'waiver' of any alleged breach of the SPA.

Held:

(1) On authority as well as on principle, the appellant was entitled to a monetary award in the sum equivalent to the current market value of the mall excluding the market value of the land without the mall. The consequence of making such an order would be that after paying the monetary sum to the appellant, the respondent would from then on enjoy the full benefit of a completely constructed mall on the land which, the court was informed, had a freehold title. This would unquestionably place the respondent in a far better position than it would have been had it not entered into the SPA with the appellant. It would be manifestly unfair and unjust for the respondent to be enriched to the extent of the full commercial value of the mall if it only had to pay the appellant for the costs of its physical construction (see para 136).

(2) The High Court and the majority of the Court of Appeal failed to judicially appreciate that the amount of unjust enrichment gained by the respondent was not the mere costs of construction of the mall but it was the value of the enhancement, improvement or enrichment of the land as a whole encompassing the obtaining of planning permission, building plan approval, design and conceptual development, business modelling and construction at the appellant's own costs, effort and experience of the shopping mall which subsequently became tenanted with an ongoing business, goodwill and brand name. The appellant had made out a cause of action in unjust enrichment against the respondent (see paras 131 & 135).

(3) The respondent was only entitled to obtain from the appellant the market rent for the unimproved land and not for an account of profits from its use and occupation. The appellant was not a trespasser but was given immediate occupation of the land and was allowed to build the mall before the balance of the purchase price was paid. The majority of the Court of Appeal while finding that the appellant's occupation of the land and construction of the mall was lawful failed to consider that the facts in the present case were clearly within the ambit of an alleged breach of contract for which other remedies were readily available. The court failed to recognise that to make an order for account of profits it would have to be shown by the respondent that the profits were brought about by the breach of contract. The appellant would have made those profits had it paid the balance purchase price in time and concluded the SPA. Viewed in this way, the profits were not net profits gained by the breach of contract. Furthermore, it was settled law that an order for account of profits would only be awarded in cases where there was a breach of a

fiduciary duty, but here, there was no fiduciary relationship between the parties. There was therefore no justification in law or equity for the making of the order for account of profits (see paras 143–144, 146, 153 & 158).

(4) Vacant possession of the land was delivered by the respondent on 21 November 2005. That finding of fact by the High Court, affirmed by the majority of the Court of Appeal, was justified and correct based on the oral and contemporaneous documentary evidence led before the trial court. There was irrefutable evidence the school was relocated on or before 19 November 2005. Subsequent to the joint inspection of the premises by the parties on 22 November 2005, the respondent's solicitors wrote to the appellant's solicitors pointing out that the appellant's representative had, at the site, confirmed his satisfaction with the eviction of the squatters and the relocation of the school. In reply, the appellant's solicitors accepted that the school had been relocated and agreed that the completion date for the SPA would be 21 March 2006, and the extended completion date, 21 May 2006. This contemporary letter clearly pointed to a very different picture from the appellant's current position. In relying, among others, on that letter to conclude that vacant possession was delivered on 21 November 2005, the courts below had applied the correct approach in testing the veracity of the oral evidence by reference to the contemporary documentary evidence (see paras 61 & 68).

(5) The appellant's contention that vacant possession was only granted on 28 February 2006 was wholly untenable because under Special Condition 1 of the SPA if vacant possession had not taken place in November 2005, ie within 12 months of the date of the SPA, the contract fell and there could be no later date to obtain vacant possession. Secondly, between the joint inspection date and 7 March 2006, the appellant did not dispute that the respondent had delivered vacant possession. It was only on 8 March 2006, which was about 14 days before the 21 March 2006 completion date that the appellant's solicitors for the first time alleged that vacant possession was only delivered on 28 February 2006. There was no evidence the appellant's use and enjoyment of the land after 21 November 2005 had been interfered with and it had free access in and out of the land and the school since that date (see paras 62 & 67).

(6) The enforceability of cl 12 of the SPA, which provided for the agreement to be treated as null and void and of no further effect if the balance purchase price was not paid within the stipulated time period, was not open to challenge. By the clear wordings of cl 12, the parties had agreed to waive the requirement for the issuance of a notice of termination upon breach of the SPA. In any event, the respondent's letter dated 9 March 2006 giving the appellant advance notice of consequential termination and its conduct on 28 August 2006 in filing the suit against

the appellant provided compelling evidence of the respondent having treated the SPA as terminated to the knowledge of the appellant after the extended completion date of 21 May 2006 (see paras 82–84).

(7) There was more than sufficient admissible evidence to support the High Court's findings that the RM5.15m paid by the appellant to the respondent three months after the SPA had expired was not part/interim payment of the contractual sum; that the appellant knew at all times that the said sum was retained by the respondent as security for damages pending a court order which was obtained on 10 October 2006 and upon the order being set aside the respondent sought to return the sum but the appellant refused to accept it. As such, it was indefensible for the appellant to contend the respondent had 'accepted' the RM5.15m. Accordingly no 'waiver' was possible. The contract was at an end and there was no legal basis to say the SPA was 'revived' or 'kept alive' on account of the said payment (see paras 90–91).

[Bahasa Malaysia summary

Perayu telah memasuki perjanjian jual beli ('PJB') pada 19 November 2004 untuk membeli tanah responden sejumlah RM33.5 juta bagi membina kompleks komersial. PJB itu, selepas penyempurnaannya, membenarkan perayu mengakses serta merta ke atas tanah itu dan hak untuk memulakan kerja pembinaan. Responden juga memberikan perayu surat kuasa wakil ('SKW') bagi membolehkannya berurusan dengan tanah itu seperti ia adalah pemiliknya. PJB itu menghendaki responden menyerahkan milikan kosong tanah itu kepada perayu selepas ia mengusir setinggan dari, dan memindahkan sekolah atas, tanah itu dan dari tarikh penyerahan milikan kosong itu, perayu mempunyai empat bulan (dengan lanjutan automatik selama dua bulan dengan bayaran faedah) untuk membayar baki harga belian itu. Perayu telah membayar deposit 10% di bawah PJB itu, memasuki tanah itu dan memulakan kerja pembinaan, menyiapkan pembinaan pusat membeli-belah pada kos RM124 juta dalam tempoh dua tahun selepas PJB ditandatangani. Pusat membeli-belah itu menjadi pusat perniagaan yang maju dan menjelang akhir 2007 nilai pasarannya adalah lebih kurang RM387 juta. Walaupun terdapat pertikaian dan kes mahkamah antara pihak-pihak berhubung bilakah milikan kosong tanah itu diserahkan dan kegagalan perayu untuk membayar baki harga belian dalam tempoh masa yang ditetapkan, pembinaan pusat membeli-belah tidak terhalang. Responden tidak membatalkan SKW itu atau memohon untuk menghentikan pembinaan itu. Berhubung pertikaian tentang tarikh penyerahan milikan kosong, responden berhujah pada 21 November 2005 apabila wakil-wakil kedua-dua pihak bersama-sama memeriksa tanah itu dan wakil perayu telah menulis nota di tapak itu menyatakan dia berpuas hati 'the school administration had been relocated' (tanah itu telah dikosongkan daripada setinggan di situ lebih awal lagi). Berikutan pemeriksaan bersama itu, responden memberitahu perayu bahawa

dengan penyerahan tanah itu, tarikh siap PJB adalah 21 Mac 2006 dan lanjutan tarikh siap dengan faedah dua bulan adalah 21 Mei 2006. Perayu, sebaliknya, berpendapat tarikh serahan adalah 28 Februari 2006 apabila responden menyerahkan kepadanya kunci-kunci pagar dan premis sekolah. Oleh kerana responden gagal menerima baki harga belian meskipun selepas tiga bulan dari tarikh siap yang dilanjutkan itu, ia telah memberitahu perayu bahawa deposit 10% telah dilucuthak dan, menurut klausa 12 PJB itu, perjanjian itu serta merta menjadi terbatal dan tidak sah. Responden menuntut perayu menyerahkan semula milikan kosong tanah itu dan ia menyaman perayu untuk yang sama di Mahkamah Tinggi pada akhir Ogos 2006. Dalam tuntutan balasnya, perayu, antara lain, memohon, sekiranya PJB itu diputuskan telah sah ditamatkan, untuk mengembalikan nilai pasaran semasa pusat membeli belah itu dengan berhujah bahawa responden secara tidak adil akan memperoleh keuntungan daripada perbelanjaan perayu jika ia mengambil alih kompleks komersial yang berkembang maju iaitu pusat membeli-belah tersebut, dengan hanya membayar kos pembinaannya. Mahkamah Tinggi memutuskan, antara lain, bahawa perayu telah melanggar PJB itu kerana gagal membayar baki harga belian menjelang tarikh siap yang dilanjutkan pada 21 Mei 2006; bahawa responden berhak melucuthak deposit itu dan bahawa berdasarkan klausa 12 PJB itu perjanjian itu secara automatik menjadi terbatal dan tidak sah. Perayu telah diperintahkan untuk mengembalikan milikan kosong tanah itu dan juga membayar responden kesemua pendapatan dan keuntungan yang diterimanya daripada jualan dan sewa atas tanah itu sebagaimana ditaksir oleh pendaftar atas premis di mana perayu menjadi pemegang amanah konstruktif. Mahkamah juga memerintahkan responden membayar kepada perayu kos untuk pembinaan pusat membeli-belah itu sebagaimana yang ditaksirkan oleh pendaftar. Majoriti Mahkamah Rayuan ('MR') mengekalkan keputusan Mahkamah Tinggi tetapi berkenaan perintah mahkamah perbicaraan tentang akaun keuntungan, MR memerintahkan agar perayu hanya dikehendaki membayar keuntungannya yang diperoleh daripada penggunaan dan pendudukan tanah itu sebagaimana yang ditaksirkan oleh pendaftar. MR juga memutuskan bahawa ia tidak wajar untuk memberi restitusi kepada perayu itu, nilai pasaran pusat membeli-belah itu kerana ia memberikan manfaat kepada perayu, yang merupakan pelanggar kontrak, melalui peningkatan dalam nilai pasaran tanah itu. Dalam rayuan itu, perayu berhujah bahawa mahkamah bawahan terkhilaf dalam kesimpulannya berhubung tarikh serahan milikan kosong tanah itu; berhubung langkah yang sewajarnya untuk restitusi yang perayu berhak memperolehinya, dan juga dalam memerintahkan perayu untuk membayar keuntungan bagi penggunaan dan pendudukan tanah itu. Tambahan pula, perayu berhujah bahawa: (i) klausa 12 PJB memperuntukkan untuk 'automatic termination' PJB itu adalah tidak sah dan tidak boleh dikuatkuasakan berdasarkan s 40 Akta Kontrak 1950 di mana responden dikehendaki memberikan notis penamatan untuk PJB itu; dan (ii) penerimaan RM5.15 juta yang dikatakan oleh responden yang telah dibayar oleh perayu

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terhadap penyelesaian harga belian lama selepas tarikh siap telah luput adalah dianggap sebagai 'waiver' untuk apa-apa pelangaran yang dikatakan terhadap PJB itu.

Diputuskan:

(1) Berdasarkan autoriti dan juga prinsip, perayu berhak memperoleh award kewangan dalam jumlah yang sama dengan nilai pasaran semasa pusat membeli-belah itu tidak termasuk nilai pasaran tanah itu tanpa pusat membeli-belah itu. Akibat daripada membuat perintah sedemikian adalah di mana selepas membayar jumlah kewangan itu kepada perayu, responden akan selepas itu menikmati manfaat sepenuhnya untuk pusat membeli-belah yang telah dibina sepenuhnya atas tanah itu yang mana, mahkamah diberitahu, mempunyai hak milik pegangan bebas. Ini memang tidak dapat disangkal lagi akan meletakkan responden dalam kedudukan yang lebih baik daripada yang sepatutnya jika ia tidak memasuki PJB itu dengan perayu. Adalah tidak adil untuk responden memperoleh keuntungan sehingga tahap nilai komersial sepenuhnya pusat membeli-belah itu jika ia hanya perlu membayar perayu kos pembinaan fizikalnya sahaja (lihat perenggan 136).

(2) Mahkamah Tinggi dan majoriti Mahkamah Rayuan telah gagal memahami secara kehakiman bahawa jumlah pengayaan yang tidak adil yang diperolehi responden bukan hanya kos pembinaan pusat membeli-belah itu tetapi ia juga nilai penambahbaikan, peningkatan atau pengayaan tanah yang secara keseluruhannya merangkumi untuk mendapatkan kebenaran perancangan, kelulusan pelan pembinaan, pembangunan konsep dan reka bentuk, model perniagaan dan pembinaan yang mana adalah kos perayu sendiri, usaha dan pengalaman daripada pusat membeli-belah yang kemudiannya telah disewa dengan perniagaan berterusan dengan nama baik dan berjenama. Perayu mempunyai kausa tindakan dalam pengayaan tidak adil terhadap responden (lihat perenggan 131 & 135).

(3) Responden hanya berhak memperoleh daripada perayu sewa pasaran untuk tanah yang tidak diubah itu dan bukan untuk akaun keuntungan daripada penggunaan dan pendudukannya. Perayu bukan penceroboh tetapi telah diberikan pendudukan serta merta ke atas tanah itu dan telah dibenarkan untuk membina pusat membeli-belah itu sebelum baki harga belian itu telah dibayar. Majoriti Mahkamah Rayuan dalam penemuan bahawa pendudukan perayu atas tanah itu dan pembinaan pusat membeli-belah itu adalah sah telah gagal untuk mengambil kira fakta dalam kes ini jelas dalam skop pelanggaran kontrak yang dikatakan remedi lain adalah sedia ada. Mahkamah gagal menyedari bahawa untuk membuat perintah untuk akaun keuntungan itu, responden perlu menunjukkan yang keuntungan itu telah diperolehi melalui pelanggaran

kontrak. Perayu mungkin telah memperoleh keuntungan itu jika ia telah membayar baki harga belian dalam masa dan merumuskan PJB itu. Menurut pandangan ini, keuntungan itu bukan keuntungan bersih yang diperolehi melalui pelanggaran kontrak. Tambahan pula, adalah undang-undang tetap bahawa suatu perintah untuk akaun keuntungan hanya akan diawardkan dalam kes-kes di mana terdapat pelanggaran kewajipan fidusiari, tetapi di sini, tidak terdapat hubungan fidusiari antara pihak-pihak. Oleh itu tiada justifikasi dari segi undang-undang atau ekuiti untuk membuat perintah bagi akaun keuntungan (lihat perenggan 143–144, 146, 153 & 158).

(4) Milikan kosong tanah telah diserahkan oleh responden pada 21 November 2005. Penemuan fakta oleh Mahkamah Tinggi tersebut yang disahkan melalui majoriti Mahkamah Rayuan, telah dijustifikasikan dan wajar berdasarkan keterangan lisan dan dokumentar semasa yang dikemukakan di hadapan mahkamah perbicaraan. Terdapat keterangan yang tidak boleh disangkal bahawa sekolah itu telah ditempatkan semula pada atau sebelum 19 November 2005. Berikutan pemeriksaan bersama ke atas premis itu oleh pihak-pihak tersebut pada 22 November 2005, peguamcara responden telah menulis kepada peguamcara perayu menunjukkan bahawa wakil perayu telah, di tapak itu, mengesahkan yang dia berpuas hati dengan pengusiran setinggan itu dan penempatan semula sekolah itu. Sebagai jawapan, peguamcara perayu telah menerima yang sekolah itu telah pun ditempatkan semula dan bersetuju bahawa tarikh siap untuk PJB itu adalah 21 Mac 2006, dan tarikh siap yang dilanjutkan, 21 Mei 2006. Surat kontemporari ini jelas menunjukkan gambaran berbeza daripada kedudukan semasa perayu. Dengan bergantung, antara lain, kepada surat tersebut untuk membuat kesimpulan bahawa milikan kosong itu telah diserahkan pada 21 November 2006, mahkamah bawahan telah menggunakan pendekatan sewajarnya dalam menguji kebenaran keterangan lisan dengan merujuk kepada keterangan dokumentar semasa (lihat perenggan 61 & 68).

(5) Hujah perayu bahawa milikan kosong tersebut hanya diberikan pada 28 Februari 2006 tidak boleh dikekalkan kerana di bawah Syarat Khas 1 PJB itu jika milikan kosong tidak berlaku dalam bulan November 2005, iaitu dalam 12 bulan dari tarikh PJB itu, kontrak itu gagal dan tidak boleh ada tarikh lain untuk memperoleh milikan kosong. Keduanya, antara tarikh pemeriksaan bersama dan 7 Mac 2006, perayu tidak mempertikaikan bahawa responden telah pun menyerah milikan kosong. Hanya pada 8 Mac 2006, iaitu lebih kurang 14 hari sebelum tarikh siap 21 Mac 2006 yang peguamcara perayu untuk kali pertama mengatakan bahawa milikan kosong tersebut hanya diserahkan pada 28 Februari 2006. Tiada keterangan bahawa penggunaan perayu atas tanah itu atau menikmati tanah itu selepas 21 November 2005 telah diganggu dan ia

mempunyai akses untuk keluar masuk ke atas tanah dan sekolah itu sejak tarikh tersebut (lihat perenggan 62 & 67).

(6) Penguatkuasaan klausa 12 PJB itu, yang memperuntukkan untuk perjanjian itu dianggap sebagai terbatal dan tidak sah dan tidak mempunyai kesan selanjutnya jika baki harga belian tidak dibayar dalam tempoh masa ditetapkan, tidak dibuka untuk dicabar. Berdasarkan susunan kata klausa 12 yang jelas, pihak-pihak bersetuju untuk mengetepikan keperluan bagi pengeluaran notis penamatan berikutan pelanggaran PJB itu. Dalam apa keadaan, surat responden bertarikh 9 Mac 2006 memberikan perayu notis terdahulu tentang penamatan seterusnya dan perbuatannya pada 28 Ogos 2006 memfailkan guaman terhadap perayu itu memberikan keterangan menarik tentang responden yang menganggap PJB itu telah ditamatkan dalam pengetahuan perayu selepas tarikh siap yang dilanjutkan iaitu 21 Mei 2006 (lihat perenggan 82–84).

(7) Terdapat keterangan boleh diterima yang lebih daripada mencukupi untuk menyokong penemuan Mahkamah Tinggi bahawa RM5.15 juta telah dibayar oleh perayu kepada responden tiga bulan selepas PJB itu luput yang bukan bayaran sebahagian/interim daripada jumlah kontraktual itu; bahawa perayu mengetahui pada setiap masa yang jumlah tersebut telah disimpan oleh responden sebagai jaminan untuk ganti rugi sementara menunggu perintah mahkamah yang telah diperoleh pada 10 Oktober 2006 dan setelah perintah diketepikan responden memohon untuk memulangkan jumlah itu tetapi perayu enggan menerimanya. Oleh itu, tidak boleh disangkal untuk perayu berhujah responden telah 'accepted' RM5.15 juta itu. Sehubungan itu tiada 'waiver' yang mungkin. Kontrak itu tamat dan tiada asas perundangan untuk mengatakan PJB itu telah 'revived' atau 'kept alive' berdasarkan bayaran tersebut (lihat perenggan 90–91).]

Notes

For cases on unjust enrichment, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6017–6018.

Cases referred to

Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd [2012] 4 MLJ 59, CA (folld)

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209, SC (refd)

A-G v Blake (Jonathan Cape Ltd third party) [2001] 1 AC 268, HL (distd)

BCM Development Sdn Bhd v The Titular Roman Catholic Bishop of Malacca Johore [2010] 5 MLJ 778; [2010] 8 CLJ 920, CA (refd)

Banque Financiere de la Cite v Parc (Battersea) Ltd [1999] 1 AC 221, HL (folld)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M

Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Blue Haven Enterprises Ltd v Tully [2006] UKPC 17, PC (consd)
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Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675, CA (refd)
Cressman v Coys of Kensington [2004] EWCA Civ 47; [2004] 1 WLR 2775, CA (refd)
Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264, CA (refd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, HL (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
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JS Bloor Ltd v Pavillion Developments Ltd [2008] EWHC 724 (consd)
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Lexane Pty Ltd v Highfern Pty Ltd [1985] 1 Qd R 446, SC (folld)
Lim Kim Chet & Anor v Multar bin Masngud [1984] 2 MLJ 165, PC (refd)
Martin v Finch [1923] NZLR 570, SC (not folld)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585, CA (refd)
Ministry of Defence v Ashman (1993) 66 P & CR 195, CA (not folld)
Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420; [2006] 4 CLJ 267, CA (refd)
Mohd Zain Yusoff & Ors v Avel Consultant Sdn Bhd & Anor [2006] 6 MLJ 314, CA (refd)
Moreton v Montrose Ltd [1986] 2 NZLR 496, CA (refd)
New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation) [1987] 2 MLJ 57, SC (not folld)
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UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785, FC (refd)
Waterman v Gerling Australia Insurance Co Pty Ltd [2005] NSWSC 1066, SC (refd)
Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (in liquidation) (1936) 54 CLR 361, HC (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)
Yee Chee Pang v Won Nam Sang Enterprise Sdn Bhd [1988] 2 MLJ 57, SC (refd)

Legislation referred to

Contracts Act 1950 ss 40, 56, 71
Courts of Judicature Act 1964 s 96(a)
Official Secrets Act 1911 [UK]
Official Secrets Act 1989 [UK]
Property Law Act 1974 [AU] s 72
Rules of the High Court 1980 O 14A

Appeal from: Civil Appeal No J-02–3018–12 of 2011 (Court of Appeal, Putrajaya) [2013] 6 MLJ 836

Cecil Abraham (Idza Hajar Ahmad Idzam with him) (Zul Rafique & Partners) for the appellant.
Cyrus Das (Steven Thiru and Gregory Das with him) (Shook Lin & Bok) and Gan Techiong (Gan & Lim) for the respondent.

Azahar Mohamed FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal from the whole of the majority judgment of the Court of Appeal that upheld the judgment of the High Court after a full trial of the matter that arose out of a contractual dispute. This appeal also raises the important question of restitutionary remedy and the law of unjust enrichment, originally also called the law of restitution.

[2] We will describe the parties in this judgment as they appear in the High Court, namely the appellant as the defendant and the respondent as the plaintiff.

[3] The subject matter of the dispute between the parties revolved around the termination of a sale and purchase agreement for a parcel of land ('the land'), where the registered proprietor Atlas Housing Sdn Bhd ('the plaintiff') was the vendor and Dream Property Sdn Bhd ('the defendant') was the purchaser. By a sale and purchase agreement dated 19 November 2004 ('the SPA'), the defendant agreed to purchase the land measuring approximately 14.4 acres and known as Grant No 101840 Lot 325 Mukim Simpang Kanan in Batu Pahat, Johor at the price of RM33.5m from the plaintiff with the plan of developing it into a commercial complex. A fully functioning completed commercial complex, with ongoing businesses and tenants now stands on the land, which, at this time is known as Batu Pahat Mall ('the mall'). In November 2007, the market value of the mall was estimated to be in the region of RM387m.

AN OVERVIEW OF THE DISPUTE

[4] The plaintiff brought an action in the High Court at Johore Bahru against the defendant to recover vacant possession of the land. In essence, the plaintiff's claim was for breach of contract by the defendant resulting in its termination and entitling the plaintiff to the return of the land as well as compensation for the loss suffered from the defendant's breach. The defendant resisted the action and made a counterclaim for specific performance and other reliefs. At the time of filing the writ in 2006, the defendant had already begun construction works on the land to build the mall. Construction proceeded notwithstanding the court action and proceedings. By the time the trial before the High Court was concluded, the mall stood completed on the land and had been fully operational since the end of 2007.

[5] The judgment of the High Court was delivered on 11 November 2011 wherein it was held that the defendant had breached the SPA resulting in its termination. The High Court ordered, among others, that:

(a) the land (together with the mall on it) be returned to the plaintiff;

(b) there be an assessment by the registrar of the High Court of profits made by the defendant on the land and it is to be paid to the plaintiff; and

(c) there also be an assessment by the registrar of the High Court of the costs of the construction of the mall on the land incurred by the defendant and it is to be paid by the plaintiff to the defendant.

[6] Subsequently, the defendant filed a notice of appeal to the Court of Appeal against the whole of the High Court judgment. At the same time, the plaintiff filed a notice of cross-appeal. On 10 May 2013, the Court of Appeal by way of a majority judgment, dismissed the defendant's appeal with costs. The plaintiff's cross-appeal was also dismissed. The majority of the Court of Appeal upheld the orders of the trial judge as set-out above. However, the majority clarified the order relating to the account of profits ordered by the High Court and ruled that the defendant was only to pay the profits derived from its use and occupation of the land.

[7] Aggrieved by the majority judgment of the Court of Appeal, the defendant applied for leave to appeal to the Federal Court under s 96(a) of the Courts of Judicature Act 1964 and on 20 February 2014, this court granted leave to appeal to the defendant in respect of eleven questions of law.

BACKGROUND FACTS

[8] The matter in dispute between the plaintiff and the defendant has had a convoluted history. It is important therefore to set-out in some detail the material background facts and events leading to the dispute as well as the chronology of the relevant court proceedings.

[9] Pursuant to the terms of the SPA, the defendant paid the 10% deposit of RM3.35m leaving a balance of RM30.15m payable in four months from the date the plaintiff as the vendor confirms that vacant possession is ready to be delivered and upon inspection and confirmation by the defendant with automatic extension of two months with interest at 7%pa payable in respect of the extended period. Pursuant to cl 17 of the SPA, time is of the essence.

[10] At the time of the execution of the SPA, the land had forty squatters and a school known as Sekolah Rendah Hwa Nan ('the school') located on it. The school occupied 0.75 acres or about 5% of the total land area. The SPA contains several special conditions and features, among which as provided by

Special Condition 4, the defendant was allowed immediate access to the land and the right to commence any construction works on the land upon execution of the SPA. In addition, the plaintiff granted a power of attorney ('the PA') dated 19 November 2004 in favour of the defendant, to enable the defendant to sign, execute and do any acts, deeds and things connected with and in relation to the land and the buildings to be erected thereon as a registered owner could.

[11] Special Condition 1 of the SPA expressly states that the plaintiff shall only hand over vacant possession of the land after the clearing of squatters from the land has taken place and the school situated on the land has been relocated.

[12] Special Condition 3 of the SPA explicitly provides as follows:

> From the date that the Vendor confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause 1 above and upon inspection and confirmation by the Purchaser, the Purchaser shall be given four (4) months from the date thereof to settle the balance of the Purchase Price to the Vendor, with an automatic extension of two (2) months commencing from the expiry of the aforesaid four (4) months provided that the Purchaser shall pay interest on the balance of the Purchase Price still unpaid at the rate of seven per centum (7%) per annum calculated from the commencement of the extended period until the full settlement of the balance Purchase Price.

[13] Before going any further, it is important to note that the dispute between the plaintiff and the defendant arose when the handing over of the vacant possession of the entire land by the plaintiff was delayed due to a disagreement in the manner of handing over and/or relocation of the school.

[14] On 16 November 2005, Messrs Gan & Tey ('the plaintiff's solicitors') wrote to Messrs Ajmer Sandhu & Ong ('the defendant's solicitors') stating that the plaintiff was ready to hand over vacant possession of the land. The letter also stated that joint inspection of the land would take place on 18 November 2005.

[15] On 17 November 2005, the defendant's solicitors wrote to the plaintiff's solicitors requesting for the date of joint inspection to be changed to 21 November 2005.

[16] On 21 November 2005, the defendant's representative, Mr Yiap Toon Cheng ('Mr Yiap') and the plaintiff's representatives, Mr Tang Pei Hau and Mr Edwin Tan jointly inspected the land. Mr Yiap admitted that joint inspection had taken place and wrote (in his own handwriting) on a pre-typed document 'I have jointly inspected the school site with Mr Edwin Tan & Mr Tang and confirm that the school administration has been relocated'.

[17] Shortly after that, on 22 November 2005 the plaintiff's solicitors wrote to the defendant's solicitors confirming that the joint inspection of the site had taken place, all the squatters had been evicted, the school relocated and that the completion date would fall on 21 March 2006 with an extension of two months subject to payment of interest at 7%pa.

[18] It is important to bear in mind that on 29 November 2005, the defendant's solicitors wrote to the plaintiff's solicitors, inter alia, accepting the contents of the letter dated 22 November 2005 provided that the school should not be demolished and the defendant would be allowed to use the school in consideration of the defendant paying RM20,000 contribution to the school.

[19] In response to the letter dated 29 November 2005, on 21 December 2005, the plaintiff's solicitors wrote to the defendant's solicitors expressing their agreement to the defendant taking over the school but that the RM20,000 was to be treated as the purchase price of the school building and not a donation. It is important to emphasise that the contents of the letter also insisted that this arrangement should not be a condition precedent to the handing over of vacant possession of the land.

[20] On 9 January 2006, the defendant's solicitors wrote to the plaintiff's solicitors, among others, requesting written confirmation and/or warranty that with the handing over of vacant possession, the defendant should enjoy quiet possession of the land and there shall be no further interference from the school and squatters in consideration of the defendant's contribution.

[21] From the defendant's point of view, a very important event took place on 28 February 2006. On that date, the plaintiff handed over the keys of the school gates and the school premises by a letter of even date to the defendant. It was also stated in the said letter that the school would then be under the control of the defendant. The contention of the defendant was that by accepting the keys to the school and by subsequently being able to access the whole of the land without hindrance, vacant possession of the land was only delivered to the defendant on 28 February 2006. On the other hand the plaintiff contended that vacant possession took place earlier ie on 21 November 2005.

[22] Then problem started brewing. On 8 March 2006, the defendant's solicitors wrote to the plaintiff's solicitors disputing the date of the handing over of vacant possession and date of completion. The letter stated that vacant possession of the land was delivered on 28 February 2006 and implying the completion date was on 30 June 2006 with a further two months extension.

[23] It has to be said at this point that there is no dispute that vacant possession was delivered. However, there was a serious dispute as to the date of delivery. A

[24] On 21 March 2006, the plaintiff's solicitors notified the defendant's solicitors that the extended completion date would commence on 22 March 2006 with late payment interest payable at the rate of 7%pa until 21 May 2006. B

[25] As events unfolded, the defendant's solicitors in its letter dated 22 March 2006 responded to the plaintiff's solicitors asserting that prior to 28 February 2006, the defendant had 'never enjoyed quiet possession in actual fact' and the completion period commenced to run only after 28 February 2006. C

D

[26] As the dispute between the parties concerning the completion and extended completion dates could not be resolved, on 21 April 2006 the defendant filed the Johor Bahru High Court Originating Summons No 24–1418 of 2006 ('the OS') for specific performance and for among others, a declaration regarding the vacant possession of the land. E

[27] On 30 June 2006, Eon Bank Bhd approved the defendant's application for banking facilities in the form of an overdraft in the sum of RM5m and a term loan in the sum of RM100m out of which a sum of RM25m was to part finance the purchase of the land. F

[28] Following the approval of the banking facilities, on 21 August 2006, Messrs Sharizat Rashid & Lee, solicitors for Eon Bank Bhd, wrote to the plaintiff's solicitors informing them that Eon Bank Bhd had conditionally granted the defendant a loan facility of RM25m to enable them to complete the purchase of the land. G

[29] The following day on 22 August 2006, the defendant's solicitors forwarded a bank draft for the sum of RM5.15m, being the differential sum of the purchase price and the loan to the plaintiff's solicitors. It is to be noted that that this payment of RM5.15m was still more than RM25m short of the balance purchase price of RM30.15m plus late payment interest. H

[30] On 25 and 29 August 2006, the defendant's solicitors wrote to the plaintiff's solicitors requesting for, among others, the title deed of the land. I

[31] Meanwhile, on 28 August 2006, the plaintiff commenced the suit herein by filing a writ of summons in the Johor Bahru High Court.

[32] The plaintiff's solicitors then wrote to the defendant's solicitors on 2 September 2006 stating that the extended completion date had expired on 21 May 2006 and that the 10% deposit was forfeited and demanded that vacant possession of the land be redelivered to the plaintiff without delay.

[33] On 8 September 2006, the plaintiff filed their statement of claim against the defendant (which was amended on 8 September 2010) where, among others, the plaintiff sought an order that vacant possession of the land be returned to the plaintiff. The defendant then filed the amended counterclaim where, among others, the defendant sought a declaration that the true date of delivery of vacant possession of the land was 28 February 2006.

[34] On 12 September 2006, the plaintiff commenced proceedings under O 14A of the Rules of the High Court 1980 ('the O 14A application') for a declaration of the date of vacant possession under the SPA. The High Court allowed the O 14A application on 10 October 2006. The defendant's OS was accordingly struck off on 17 November 2006.

[35] Next, on 19 October 2006, the defendant filed an appeal to the Court of Appeal with regards to the O 14A application. On 2 November 2007, the Court of Appeal by majority judgment dismissed the defendant's appeal with regards to the O 14A application.

[36] On 5 September 2008, the Federal Court granted leave to the defendant to appeal against the decision of the Court of Appeal. On 8 June 2010, the Federal Court set aside the majority judgment of the Court of Appeal as well as the orders made by the High Court in the Order 14A application. The Federal Court ordered that the matter be remitted to the High Court for a full trial.

[37] The trial of the suit herein in the High Court commenced on 16 February 2011 and concluded on 1 June 2011. As mentioned earlier, the decision of the High Court was delivered on 11 November 2011 allowing the plaintiff's claim and on 10 May 2013, the Court of Appeal by way of a majority decision dismissed the defendant's appeal.

[38] Coming back to the sequence of events, the important point to note is that physical construction of the mall commenced in January 2006 and was completed in December 2006 at the costs of RM124m. Despite ongoing litigation between the defendant and the plaintiff, the defendant carried on with the construction of the mall on the land since the defendant took the position that it was entitled to do so under the SPA and the PA. The SPA and PA were structured to facilitate the defendant to construct the mall upon the

execution of the SPA as it was the target of the defendant to carry out business in January 2007 before the Chinese New Year.

[39] On 22 January 2007, a temporary CFO was issued in the defendant's name for the mall constructed on the land. The final CFO for the mall was issued on 20 November 2007.

[40] After the completion of the construction of the mall, the PA was revoked by the plaintiff on 19 June 2008.

[41] On 30 June 2010, the plaintiff's solicitors forwarded the differential sum of RM5.15m to the defendant's solicitors after the Federal Court set aside the decision of the Court of Appeal and orders by the High Court in the O 14A application.

[42] The defendant did not accept the refund. On 1 July 2010, Messrs Yeo, Tan, Hoon & Tee ('the defendant's new solicitors') returned the cheque for the RM5.15m to the plaintiff's solicitors.

[43] On 16 July 2010, the defendant's new solicitors forwarded the balance sum of RM25m to the plaintiff's solicitors. The plaintiff did not accept the payment and returned the cheque the same day.

[44] It was the defendant's contention that the plaintiff had never given any notice of termination of the SPA to the defendant.

[45] The plaintiff had accepted the differential sum for the land in the amount of RM5.15m whilst the litigation was ongoing.

[46] It is an undisputed fact that the plaintiff at no point in time ever took out proceedings for an injunction to stop the defendant from constructing the mall on the land.

PROCEEDINGS AT THE HIGH COURT

[47] After a full trial of 11 days, with six witnesses testifying for the plaintiff and two for the defendant, the High Court found for the plaintiff. The reliefs granted by the High Court may be summarised as follows:

(a) a declaration that vacant possession of the land was given by the plaintiff to the defendant on 21 November 2005;

(b) a declaration that the defendant has failed to make payment of the balance purchase price and the interest on the extension of time on or

before 21 May 2006 and as such the deposit of 10% of the purchase price paid by the defendant shall be forfeited by the plaintiff;

(c) the defendant is to return vacant possession of the land within two months from the date of judgment;

(d) a declaration that the SPA dated 19 November 2004 between the plaintiff and the defendant has become void as the purchase price was not fully paid by the defendant before 31 August 2006;

(e) a declaration that the SPA has become void in accordance to cl 12 due to the defendant's failure to fully pay the purchase price;

(f) a declaration that the defendant had breached the SPA and the PA by continuing with construction works on the land without paying the purchase price;

(g) a declaration that the defendant had breached the SPA and the PA by entering into agreements with the third parties without the plaintiff's consent and wrongfully selling the land or portions thereof;

(h) a declaration that the defendant is a constructive trustee for all the income and profits received from the sale and rent on the land;

(i) the defendant is hereby ordered to give an account of all the income received from the sale and rent on the land and the profits obtained therefrom;

(j) an assessment of damages by the deputy registrar to determine the income received from the sale and rent on the land and the profits obtained therefrom to be paid by the defendant to the plaintiff;

(k) the plaintiff is to return to the defendant the sum of RM5.15 (being the differential sum) million plus interest at the rate of 4%pa from 8 June 2010 until the date of payment;

(l) assessment by the deputy registrar to determine the costs of construction of the mall, to be paid by the plaintiff to the defendant; and

(m) joint assessment by the deputy registrar on the income received from the sale and rent on the land and the profits obtained therefrom, and the costs of construction of the mall.

THE PROCEEDINGS AT THE COURT OF APPEAL

[48] The majority of the Court of Appeal upheld the orders of the trial judge as set-out above. However, as indicated earlier, the majority clarified the order relating to the account of profits ordered by the High Court and ruled that the defendant was only to pay the profits derived from its use and occupation of the land, following the assessment by the registrar of the High Court.

[49] In deciding in favour of the plaintiff, the majority of the Court of Appeal affirmed the following findings of facts of the High Court, which relied on the oral and documentary evidence of the parties. The concurrent findings were:

(a) the delivery of vacant possession by the plaintiff was on 21 November 2005, and the completion date for the SPA was on 21 March 2006 or the extended completion date of 21 May 2006; and

(b) the defendant breached the SPA when it failed to pay the 90% balance of the purchase price on 21 March 2006 or 21 May 2006, and the SPA was automatically terminated by virtue of cl 12 of the SPA.

[50] The Court of Appeal also delivered a minority judgment. The minority of the Court of Appeal held that the handwritten note written on 21 November 2005 by the defendant's representative was not a confirmation of acceptance of vacant possession of the land pursuant to the SPA, but was instead a confirmation of the fact that the school administration had been relocated. Therefore, this could not be construed as confirmation of acceptance of vacant possession as envisaged by Special Condition 3 of the SPA. Further, it was held that the acceptance of RM5.15m which was a differential sum by the plaintiff towards the purchase of the land after the alleged date of 21 May 2006, amounted to an act of waiver on the part of the plaintiff. By so doing, it had waived its rights to insist on the strict compliance of Special Condition 3 of the SPA. The minority of the Court of Appeal allowed the defendant's counterclaim and granted the following reliefs:

(a) a declaration that the true date of delivery of vacant possession of the land was 28 February 2006;

(b) a declaration that the SPA dated 19 November 2004 has not been validly or legally terminated; and

(c) an order that the plaintiff do accept payment from the defendant the balance purchase price of RM25m and that upon receipt of the said balance purchase price the plaintiff do forthwith deliver to the defendant the original issue document of title to the land and do all other things necessary to enable the land to be transferred free from encumbrances to the defendant.

[51] So much about the background facts and sequence of events leading to the present appeal.

THE QUESTIONS OF LAW ON APPEAL TO THE FEDERAL COURT

[52] As mentioned earlier, on 20 February 2014, this court granted leave to the defendant to appeal against the majority decision of the Court of Appeal on the following questions of law:

(1) whether as a matter of law if the defendant was in breach of contract for the purchase of the land dated 19 November 2004, whether it precludes the defendant from being awarded restitution pursuant to the doctrine of unjust enrichment in respect of the defendant's improvement and enhancement of the land, namely by obtaining planning permission, building plan approval and constructing at the defendant's own cost, effort and experience, upon the land and a shopping mall which subsequently was tenanted with an ongoing business, goodwill and brand name thereupon without the plaintiff (compensating the defendant for having improved the ultimate market value of the land and is the defendant's remedy merely confined to compensating the defendant merely for the cost of construction of the said shopping mall? ('Question 1');

(2) what is the measure of restitution for unjust enrichment, in particular, is the measure of restitution calculated merely restricted to the cost of construction of a building, without reference to the enhancement of the market value of the said land? ('Question 2');

(3) whether as a matter of law, the defendant is required to account for profit to the plaintiff where the defendant is only liable for breach of contract but not liable for any breach of trust and/or breach of a fiduciary duty? ('Question 3');

(4) whether as a matter of law, if the defendant is alleged to be in breach of the contract, would not damages be an adequate remedy rather than restitution and/or having to account for profits? ('Question 4');

(5) whether 'automatic termination' is a concept and/or doctrine that is enforceable under the law of contract in Malaysia in the light of the provisions of s 56 of the Contracts Act 1950 and the case of *P Palakrishnan a/l Perianan lwn Krishnamoorthy a/l Sinniah dan satu lagi* [2001] 5 MLJ 389 ('Question 5');

(6) if Question (5) is answered in the affirmative, the manner in which an 'automatic termination' clause has to be provided for in the contract between the parties in order for it to be enforceable? ('Question 6');

(7) whether the concept of 'vacant possession' means to merely deliver an empty property or a property in a state in which it can be enjoyed and occupied exclusively by the owners themselves or by tenants or licensees? ('Question 7');

(8) whether as a matter of law, the conduct of a vendor in accepting part payment and/or interim payment of the purchase price from a purchaser has the legal effect of keeping the SPA 'alive' and/or reviving the terms of thesale and purchase agreement alleged to have lapsed and/or terminated or amounts to an act of having waived the vendor's legal right to terminate the sale and purchase agreement? ('Question 8');

(9) whether as a matter of law, a purchaser in possession of the land ought to pay the vendor an account of actual profits or merely mesne profits calculated on the basis of market rent for the occupation of the unimproved land? ('Question 9');

(10) whether as a matter of law, a purchaser in possession is entitled to subjectively devalue the compensation payable and/or benefits/profits gained or generated from the occupation of the land following the principles found in *Ministry of Defence v Ashman* (1993) 66 P & CR 195? ('Question 10'); and

(11) whether as a matter of law, the purchaser in possession's skill, effort, property and resources, capital and risk that had generated profits should be taken into account in the award for the occupation of the land? ('Question 11').

[53] Questions 5–8 deal with the liability questions. Whilst the remaining questions 1–4 and 9–11 relate to relief questions.

[54] We will deal first with the liability questions.

The liability questions

(a) Vacant possession

[55] The liability questions are intertwined and focused for the most part on the key issue of whether the SPA was validly terminated by the plaintiff. Prior to entering into the SPA, the plaintiff and the defendant were aware that there were 40 squatters and the school on the land. It is pertinent to note that the school occupied a mere 5% of the land. The plaintiff was to grant vacant possession of the land by removing the squatters and relocating the school, within the time period provided in the SPA. The defendant was then obliged to complete the SPA by paying the balance purchase price (90%). The time period to complete the SPA by the defendant was to be computed from the date on which the plaintiff delivered vacant possession of the land. Nothing turns on the removal of the squatters in this case considering that it is not disputed that the squatters were evicted from the land by 21 November 2005. The dispute centres on the date on which the school was relocated by the plaintiff

(for vacant possession purposes), and the date on which the defendant ought to have paid the balance purchase price (90%) to complete the SPA.

[56] The date of delivery of vacant possession of the land is therefore critical for the reason that in accordance with the terms of Special Condition 3, the balance purchase price of RM30.15m becomes due four months (with two months automatic extension) from the date of vacant possession.

[57] As we pointed out earlier, the plaintiff's position is that the school was relocated and vacant possession was delivered on 21 November 2005. Thus, the balance purchase price became payable on 21 March 2006 (or on the extended date of 21 May 2006) per the SPA; the defendant failed to pay the balance purchase price on 21 March 2006 or 21 May 2006. The SPA was thereafter terminated pursuant to cl 12 of the SPA. Learned counsel for the plaintiff submitted that the plaintiff delivered vacant possession under Special Condition 1 on 21 November 2005, and therefore the provisions of Special Condition 3 were triggered. Thus, the balance purchase price became payable on 21 March 2006 or on the extended date of 21 May 2006 (with interest).

[58] On this issue, the submissions of learned counsel for the defendant can be summarised as follows. An important part of Special Condition 1 of the SPA was that the plaintiff had to hand vacant possession to the defendant upon the relocation of the school that was then situated on the land. Upon being given vacant possession, the defendant was given a maximum of six months to settle the balance of the purchase price. The representative of both the defendant and the plaintiff met on 21 November 2005 to inspect the land and to certify whether the school had been relocated. The school had four gates which were locked and the keys to the gates were only handed to the defendant on 28 February 2006. When the representatives of the defendant and the plaintiff met on 21 November 2005 to inspect the land, the representative of the defendant was asked to sign a pre-typed letter stating that vacant possession of the land had been delivered to the defendant. The defendant's representative refused to sign the pre-typed letter as prepared by the plaintiff and instead wrote the following words in his handwriting in the said letter: 'I have jointly inspected the school site with the Edwin Tan & Tang and confirm that the school administration has been relocated'. The handwritten note did not constitute a confirmation that vacant possession of the land had been delivered to the defendant within the meaning of Special Condition 3 of the SPA. Both the High Court and the majority of the Court of Appeal attached an erroneous importance to the inspection carried out on 21 November 2005 by the representatives of both the defendant and the plaintiff. The High Court and the majority of the Court of Appeal drew an erroneous series of inferences that clouded the principal issue of vacant possession. To end his submissions, learned counsel for the defendant submitted that the majority of the Court of

Appeal and the High Court had erred in holding that vacant possession of the land concerned had been delivered by the plaintiff to the defendant in the manner required under the terms and conditions of the SPA on 21 November 2005 instead of on 28 February 2006.

[59] In deciding in favour of the plaintiff, the majority of the Court of Appeal affirmed the findings of fact of the High Court, which relied on the oral and contemporaneous documentary evidence of the parties. The concurrent findings of facts were first, the delivery of vacant possession by the plaintiff was on 21 November 2005, and the completion date for the SPA was on 21 March 2006 or the extended completion date of 21 May 2006; and secondly, the defendant breached the SPA when it failed to pay the 90% balance of the purchase price on 21 March 2006 or 21 May 2006, and the SPA was automatically terminated by virtue of cl 12 the SPA.

[60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1(at p 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p 800:

> It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[61] In our judgment, the concurrent findings were clearly justified and correct based on the oral and contemporaneous documentary evidence led before the High Court. There is irrefutable evidence that the school had, at the request of the plaintiff (and upon receiving compensation of RM1.5m from the plaintiff), agreed to move out of the land by 18 November 2005. The evidence of the headmaster of the school ('PW6') and the evidence of the lorry driver ('PW5') at who did the shifting showed that the school was in fact relocated on or before 19 November 2005. The plaintiff then confirmed that the land was ready for delivery of vacant possession on 16 November 2005 and proposed an inspection of the premises on 18 November 2005. However, the defendant proposed that a joint inspection to take place on 21 November 2005. The inspection was jointly carried out by the representative of both sides on 21 November 2005. Upon completion of the inspection the defendant's representative confirmed that he had 'jointly inspected the school site with Mr Edwin Tan and Mr Tang and confirmed that 'the school administration has

been relocated'. It is to be noted that subsequent to the inspection, on 22 November 2005 the plaintiff's solicitors wrote to the defendant's solicitors that there was a '... joint viewing of the site between your clients representative Mr Yiap Toon Cheng and our client's on 21st November 2005 ...' and stated that the defendant's '... representative has confirmed that he is satisfied with the eviction of all the squatters and the relocation of the school'. In reply, the defendant's solicitors accepted that the school had been relocated and agreed that the completion date would be 21 March 2006 (and the extended completion date would be 21 May 2006. Significantly, this contemporary letter clearly points to a very different picture from the defendant's current position. In relying, among others, on this letter to conclude that vacant possession was delivered on 21 November 2005, the High Court and the majority of the Court of Appeal had applied the correct approach in testing the veracity of oral evidence by reference to the contemporary documentary evidence. In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, Chang Min Tat FJ explained the importance for trial judge to have regard to the contemporary documents:

> Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witness and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[62] In our view, there are at least three reasons why the contention of the defendant that vacant possession was only granted on 28 February 2006 are wholly untenable. In the first place, under Special Condition 1, if vacant possession had not taken place in November 2005 ie within 12 months, then the contract fell and there could be no later date to obtain vacant possession. Secondly, between 21 November 2005 ('the joint inspection') to 7 March 2006, the defendant did not dispute that the plaintiff had delivered vacant possession. It is the ordinary nature of businessman to immediately refute any proposition injurious to him contained in letters and not to let it stands (see *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155). Thus, the previous conduct of the defendant in accepting that the delivery of vacant possession was on 21 November 2005 was plainly contrary to its new position that vacant possession was only granted on 28 February 2006. Thirdly, it was only on 8 March 2006, which was about 14 days before the completion date (21 March 2006), that the defendant's

solicitors for the first time alleged that vacant possession was only delivered on 28 February 2006.

[63] This brings us to the issue of 'quiet possession' raised by the defendant. In its letter of 8 March 2006, the defendant's solicitors alleged that the defendant '... has not indeed enjoy quiet possession ...' and they repeated this in their letter of 22 March 2006 '... our client has never enjoyed quiet possession in actual fact ...'.

[64] There is no provision under the said SPA concerning the 'quiet possession' of the land. As submitted by learned counsel for the plaintiff, there was nothing in the SPA that obliged the plaintiff to give a guarantee/warranty of 'quiet possession' to the defendant. It is an established principle that a party to a contract cannot ex post facto seek to introduce a new term into the contract which is all together outside the contract (see the judgment of Privy Council in *Phoenix Heights Estate (Pte) Limited v Lee Kay Guan & Anor* [1982] 2 MLJ 86 (at p 88) and also *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420; [2006] 4 CLJ 267).

[65] In our view, the defendant has attempted to unilaterally introduce a new term (of quiet possession) in the SPA. Further, it is noteworthy that the defendant had never at any time between 21 November 2005 and February 2006 written to the plaintiff to complain about any 'lack of quiet possession' of the land.

[66] Moreover, we agree with the submission of learned counsel for the plaintiff that as a matter of law, the defendant was obliged to show that the interference by the school, if any, was substantial, to succeed in its claim that the interference vitiated the delivery of vacant possession. This principle can be seen in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 where the English Court of Appeal decided that any physical impediment to vacant possession must substantially prevent or interfere with the enjoyment of the right of possession to a substantial part of the property. The case of *Cumberland Consolidated Holdings Ltd v Ireland* has been more recently considered by the English Court of Appeal and approved in *Ibrend Estates BV v NYK Logistics (UK) Ltd* [2011] 4 All ER 539.

[67] On the facts of the present case, there is no evidence that the plaintiff or the school authority had prevented the defendant from entering the land after the joint inspection of 21 November 2005. Moreover, there is also no evidence that there was any interference with the defendant's use and enjoyment of the land after 21 November 2005; and as at 21 November 2005, the defendant was already in occupation of 95% of the land. In truth, the defendant had free access in and out of the land and the school since 21 November 2005.

[68] On the issue of vacant possession, we therefore conclude that vacant possession of the land was delivered by the plaintiff on 21 November 2005.

(b) Automatic termination

[69] Evidently, as set-out earlier, the defendant only paid the 10% deposit of the purchase price and failed to pay the balance purchase price by the completion date of 21 March 2006. Thereafter, the plaintiff's solicitors issued the defendant a notice of extension of two months pursuant to Special Condition 3. The defendant did not challenge this notice. The defendant then breached the SPA by failing to pay the balance purchase price by the extended completion date of 21 May 2006. In this regard, it is trite that the obligation to pay the purchase price is a fundamental obligation of the SPA. The failure to pay the balance purchase price goes to the root of the SPA thereby rendering the SPA terminated (see *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585, *Yee Chee Pang v Won Nam Sang Enterprise Sdn Bhd* [1988] 2 MLJ 57, and *BCM Development Sdn Bhd v The Titular Roman Catholic Bishop of Malacca Johore* [2010] 5 MLJ 778; [2010] 8 CLJ 920).

[70] In the present case, the failure on the part of the defendant to pay the balance purchase price by the completion date brought into operation cl 12 of the SPA.

[71] Learned counsel for the plaintiff contended that this resulted in the automatic termination of the said SPA and accordingly, there was no requirement for a notice of termination to be issued by the plaintiff to the defendant.

[72] Both the High Court and the majority of the Court of Appeal accepted that the SPA had been validly terminated in accordance to cl 12. The majority of the Court of Appeal upheld the findings of the High Court in that there was 'automatic termination' of the SPA as provided for by cl 12 of the SPA as a fundamental breach of the contract had taken place. There was no obligation for the plaintiff to give the defendant any notice of termination as the plaintiff had alerted the defendant's solicitors of the consequence of not paying the balance of the purchase price by 21 May 2006. On this point, the majority of the Court of Appeal decided as follows:

> I turn now to the argument that the plaintiff did not invoke cl 12 because it had not at the material time elected to terminate the SPA and did not issue any notice of termination. The answer to this lies in the wording of cl 12 itself. It says, 'the contract shall be treated as null and void and of no further effect'. In the New Zealand case of *Moreton v Montrose Ltd* [1986] 2 NZLR 496 cl 22 of the agreement

in question stated that if either of two specified conditions were not satisfied then the agreement was to be 'null and void'. The Court of Appeal of New Zealand held at (p 497 of the report):

> The words 'null and void' in cl 22 must be construed so as to have their literal meaning ... there being no reason in the agreement to depart from the accepted ordinary meaning of 'null and void', then those words must have their full effect. The contract would automatically terminate if the conditions were not satisfied.

Thus, in our present case the SPA was automatically terminated when the defendant failed to pay the balance purchase price on or before 21 May 2006, the extended completion date. There was no necessity to make an election or issue notice of termination.

[73] Learned counsel for the defendant submitted that the majority of the Court of Appeal failed to adequately evaluate and appreciate the correct principles of law that in the event of a breach by a party to a contract, the aggrieved party had to elect whether to continue with or to terminate the contract, and must communicate of such election to the other party. Learned counsel submitted that the critical conduct of the plaintiff which the High Court and the majority of the Court of Appeal seemed to have paid inadequate attention to was that although claiming that the agreement was terminated, the plaintiff did absolutely nothing save for issuing one letter to the defendant stating that the plaintiff should stop construction on the land, which the defendant did not do as there was no notice of termination of the SPA, and the fact that the PA was never terminated, which allowed the defendant to deal with the land. It was his contention that the majority of the Court of Appeal erred in holding that the SPA was 'automatically' terminated on 21 May 2006 by operation of cl 12 of the said SPA.

[74] To support his contention, learned counsel for the defendant brought to our attention the case of *P Palakrishnan a/l Perianan lwn Krishnamoorthy a/l Sinniah dan satu lagi* [2001] 5 MLJ 389 where it was held that there was no concept of automatic termination of contract under contract law; therefore, a party who wished to terminate the contract on presumption that the other party had breached the terms must state the intention to do so in writing or orally.

[75] It is very important now to take a closer look at cl 12 of the SPA:

> In the event of the Purchaser failing or neglecting to pay the balance of the purchase price on the Completion Date or on the Extended Completion Date whichever is applicable a sum equivalent to the sum stated in Section 7 of the schedule hereto shall be forfeited to the Vendor whereupon this Agreement shall be treated as null and void and of no further effect.

[76] In our view, whether or not a clause in an agreement has the effect of providing for automatic termination and confers on a party a right to immediate termination, must be considered by the words used by the parties in the particular agreement and this will depend very much on the circumstances of each individual case. In the present case, however, what stands out is that on a matter of substance, cl 12 expressly provides that 'the contract shall be treated as null and void and of no further effect'. The contractual language is clear and plain enough. That explicit and unambiguous words must be given its literal meaning. The immediate consequence of the termination compellingly favours the view that automatic termination was intended by the plaintiff and the defendant when they mutually agreed to be bound by the SPA. In our view, cl 12, as a contractual term explicitly agreed between the plaintiff and the defendant, provides for the automatic termination of the SPA upon the defendant's failure to pay the balance purchase price within the stipulated time period. In such a situation, there was no requirement for a notice of termination to be issued by the plaintiff to the defendant.

[77] The concept of the automatic termination of a contract, pursuant to the terms of the contract, is not novel or unusual in Malaysian contract law as can be seen in the following cases cited by learned counsel for the plaintiff: *Sangkala Sdn Bhd v Bennlim Engineering S/B & Anor* [1998] MLJU 648; [1998] 1 LNS 275, where the High Court upheld the automatic termination clause of a sale and purchase agreement on the grounds that the balance purchase price had not been paid within the stipulated time frame; *Tan Beng @ Tan York Soon v Ji Kang Dimensi Sdn Bhd (formerly known as Perindustrian Dimensi Sdn Bhd) & Anor* [2001] MLJU 512; [2001] 1 LNS 336, where the High Court held that the automatic termination clause of a sale and purchase agreement had been validly invoked; *SCK Group Berhad v Poh Chen Guang & Th'Ng Kim Aun* [2002] MLJU 194; [2002] 1 LNS 108, where the High Court again upheld the automatic termination clause in a contract in the context of an application for summary judgment; and *Norani bin Maniran dan satu lagi lwn Mayban General Assurance Bhd* [2012] 9 MLJ 610, where the automatic termination clause under the contract was upheld by the High Court. We were also referred to a decision of the Court of Appeal in *Kredin Sdn Bhd v YTF Investments Sdn Bhd* [1998] 1 MLJ 46; [1998] 1 CLJ 205. In that case YTF Investments Sdn Bhd ('YTF') and Kredin Sdn Bhd ('Kredin') entered into a sale and purchase agreement dated 29 October 1992 whereby the Kredin agreed to purchase three pieces of land for RM47.5m. Kredin obtained a loan for RM15.7m from a bank. A deposit of RM5m had been paid by Kredin. According to the agreement, the balance of the purchase price of RM42.5m was to be paid on or before the completion date which was 30 June 1983 and time was of the essence. It was also provided that in the event of Kredin failing to pay the balance of the purchase price by the completion date, the deposit of RM5m would be forfeited to YTF as agreed liquidated damages and thereupon the agreement would become null and void, and YTF would be entitled to deal

with the property as it deemed fit. Kredin had in fact failed to pay the balance of the purchase price by the completion date and this was not disputed. YTF therefore terminated the agreement and accordingly forfeited the deposit of RM5m. Kredin, among others, contended that the agreement was not properly terminated as notice of termination was required to be given to the bank and this YTF had failed to do. The Court of Appeal held that the agreement was properly terminated on 1 July 1983 as Kredin had failed to meet its obligation to settle the balance of the purchase price by the completion date. The agreement therefore became null and void, pursuant to a clause in it. The court upheld the validity of the automatic termination of the sale and purchase agreement in view of the contract-breaker's failure to pay the balance purchase price by the completion date. In the words of the Court of Appeal:

> In the light of the provisions of the sale and purchase agreement, we hold that no notice of termination of the sale and purchase agreement need ever be given to anyone. This fact cannot be made more clear than cl 9 of the sale and purchase agreement. The sale and purchase agreement is automatically terminated by 1 July 1983 when Kredin failed to pay the balance of the purchase price by the completion date ie, 30 June 1983. There is no provision anywhere to say that YTF is required to issue notice of termination and forfeiture. It is our view that YTF was being over cautious when it gave 1 July 1983 notice to Kredin. The central issue is whether the sale and purchase agreement has in law come to an end, or is it still subsisting. We hold that in law the agreement came to an end on 1 July 1983 when Kredin failed to settle the balance of the purchase price.

[78] In our judgment, the above passage and the passage from the judgment of the majority of the Court of Appeal in the instant case which we have referred to earlier in para 72, state correctly the law on automatic termination. We therefore agree with the submission of learned counsel for the plaintiff that the case of *P Palakrishnan a/l Perianan lwn Krishnamoorthy a/l Sinniah dan satu lagi*, was decided per incuriam as it did not consider the Court of Appeal case of *Kredin Sdn Bhd v YTF Investments Sdn Bhd* which upheld the enforceability of the automatic termination clause in the context of a sale and purchase agreement. In our view, there can be no question as to the enforceability of the automatic termination clause in the SPA in the instant case under Malaysian contract law.

[79] It is noteworthy that, as submitted by learned counsel for the plaintiff, the automatic termination of a contract is a concept that is recognised across the Commonwealth as can be seen in the Privy Council case of *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1, *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (in liquidation)* (1936) 54 CLR 361 (High Court of Australia), *Moreton v Montrose Ltd* [1986] 2 NZLR 496 (Court of Appeal of New Zealand) and *Waterman v Gerling Australia Insurance Co Pty Ltd* [2005] NSWSC 1066 (Supreme Court of New South Wales).

[80] This leads us to the contention of learned counsel for the defendant that cl 12 is void pursuant to the provisions of s 40 of the Contracts Act 1950 which stipulates that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[81] The point put forward by learned counsel for the defendant raised the important question whether parties may contract out of the Contracts Act 1950. This was the principle issue for decision in *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222. On this point, the Privy Council explained the 'freedom to contract' principle in the following terms (with the necessary emphasis):

> All that s 1(2) of the Contracts Act is saying is that the legal consequences of a contract which ensue at common law are to continue to apply unless some different legal consequences are spelt out by the Act. The subsection does not say that the contracting parties are unable by agreement to vary the legal consequences spelt out by the Act. *Section 1(2) has no effect on the freedom of contracting parties to decide upon what terms they desire to contract. It would indeed be surprising if so devastating an inroad into the common law right of freedom of contract were introduced by the Legislature in a section which is primarily devoted to expressing the short title to the Act and which moreover appears in a part of the Act which is merely headed 'Preliminary'*. In an early case before the board concerning the Indian Contracts Act 1872, the expression 'incident of the contract' was used precisely in the sense which Their Lordships have indicated. See *Irrawaddy Flotilla Company v Bugwandass* (1890) 18 1A 121. The argument founded on a comparison between (i) ss 86, 92 and 94 and (ii) certain other sections of the Act which are expressed to be 'subject to a contrary intention' or the like also fails. Random recognition in certain sections of the Act of the fundamental principle that contracting parties are at liberty to express their intentions in their contracts as they please is quite insufficient to support the contrary proposition that the absence of such recognition in another section implies the absence of freedom to contract. *If freedom to contract is to be curtailed in relation to a particular subject matter, Their Lordships would expect the prohibition to be expressed in the statute, and not left by the Legislature to be picked up by the reader as an implication based upon sections dealing with different subject matters*. Furthermore, it may be noticed that when the Contracts Act intends to render an agreement void, it says so in express terms; see ss 25–31 under the crossheading 'Void Agreements', read with the definitions in s 2(c) and (g). (Emphasis added.)

[82] By parity of reasoning, in our judgment, in view of the clear wording of cl 12, the parties to the SPA had agreed to waive the requirement for the issuance of a notice of termination upon the breach of the SPA. This is because, as we have explained earlier, cl 12 expressly provides that the SPA 'shall be treated as null and void and of no further effect upon the non-payment of the balance purchase price within the stipulated time period'. In the result, the enforceability of cl 12 is not open to challenge.

[83] In any event, as submitted by learned counsel for the plaintiff, vide letter dated 9 March 2006 the plaintiff had informed the defendant advanced notice of consequential termination. The material part of the 9 March 2006 letter reads as follows:

> Therefore, we confirm that the completion of the sale and purchase shall fall on 21/3/2006 with an extension of two (2) months with late payment interest at the rate of 7% per annum failing which our clients shall terminate the sale and purchase and forfeit the 10% deposit paid. Our client also reserve the rights to claim for all damages, late payment interest and losses suffered due to your clients' breach including having the property restored to its original conditions by your clients and apply to the Court of Law for an injunction to stop further construction by your clients until the matter has been adjudged by the Court.

[84] It is for the court to infer from the surrounding circumstances whether, pursuant to s 40 of the Contracts Act 1950, the plaintiff had elected to affirm in the continuance of the SPA or to treat it as at an end (see the objective test propounded in *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420; [2006] 4 CLJ 267). In our view, the letter dated 9 March 2006 and the plaintiff's conduct on 28 August 2006 in filing the writ of summons herein, which initiated the present suit against the defendant provide compelling evidence of the plaintiff having treated the SPA as terminated to the knowledge of the defendant after the extended completion date of 21 May 2006.

(c) Part payment/interim payment of the purchase price

[85] From the background facts that we have narrated earlier, it was in evidence that the plaintiff accepted a sum of RM5.15m, being the differential sum from the defendant, three months after the expiry of the SPA.

[86] The contention of learned counsel for the defendant was that the act of receiving the sum of RM5.15m after the alleged extended completion date amounted to an act of waiver of any alleged breach of the SPA. Learned counsel submitted that it was a clear indication that time was not of the essence in so far as making payment of the balance of the purchase price was concerned. This act, it was contended, also would have revived the SPA.

[87] On this issue, the High Court made a finding of fact that the plaintiff did not accept part payment and/or interim payment of the purchase price. This is what the High Court said:

> Let us take first the payment of the RM5.15m. The thing to say is that this payment was made on 22 August 2006 — long after the expiry of the completion and extended completion dates. It can hardly be counted because the performance that was required of the defendant under the contract was to pay the full purchase price by the completion date or extended completion date. By the time the differential

sum was given, the contract has already ended. Offering part payment on 22 August 2006 was not part performance of the contract as far as I was concerned. As for saving that the plaintiff has accepted the payment, I think this is also misconceived. The plaintiff's solicitors made it clear in their letter of 2 September 2006 (B125) that they would seek a court order to withhold it should the defendant not return vacant possession of the land. Eventually the court on 10 October 2006 did grant such an order. That order was however set aside on 8 June 2010 by the Federal Court. After it was set aside, the plaintiff promptly refunded it but the defendant refused to accept it. Thus, in my judgment, there was no acceptance of part payment in that.

[88] The High Court also dealt with the issue of waiver in this manner:

Further to that, it needs to be emphasised that the plaintiff's solicitors had been explicit about what they intended to do with the sum and this was made known to the defendant's solicitors (see B125–126 and B137). The plaintiff's solicitors were categorical that they were seeking a court order to withhold the money and keep it as security for damages pending the court order. The defendant's solicitors in their reply letter B127 were silent on this point and never raised any objection. To my mind, the argument can he turned on its head against the defendant too because the defendant's silence can be and should be taken as acquiescence. Moreover it is not as if the plaintiff had not obtained the court order that they sought. They obtained it at first instance and upon it being set aside on 8 June 2010 by the Federal Court, the plaintiff's solicitors returned it. The defendant chose to reject it. For this reason I dismiss the argument for the defendant that the plaintiff by reason of this, had waived the breach or acquiesced in the same.

[89] In our judgment, on consideration of the evidence and the material available in the records of appeal, it was entirely reasonable for the High Court to arrive at the above conclusion. There was more than sufficient admissible evidence to support the High Court's findings. It is trite that an appellate court would be slow to disturb a trial court's findings of facts in the absence of any perverse and unwarranted finding on the totality of the evidence before it. The cases of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113; *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 and *Lim Kim Chet & Anor v Multar bin Masngud* [1984] 2 MLJ 165 are some of the authorities to support the cardinal principle that an appellate court should be slow in interfering with a finding of fact of the trial court which had observed the demeanour and heard the witnesses before coming to its conclusion. In the present appeal, it has not been successfully shown to us that the findings of the High Court is against the weight of evidence or perverse in any way. The judgment of the High Court does not contain any serious error warranting appellate interference.

[90] The findings confirm that the RM5.15m was not part/interim payment of the contractual sum and the payment in question was made on

22 August 2006, long after the expiry of the completion dates and the termination of the contract. As found by the High Court, the defendant knew at all material times that the RM5.15m was being retained by the plaintiff as security for damages pending a court order which was obtained on 10 October 2006 and upon the order being set aside the plaintiff sought to return but the defendant refused to accept it. In this way, no waiver was possible. It is, therefore, indefensible for the defendant to contend that the plaintiff accepted the RM5.15m. Indeed, the defendant cannot take advantage of its own refusal to take back the sum.

[91] Furthermore, we entirely agree with the submissions of learned counsel for the plaintiff that once the contract was terminated then it was at an end save for the innocent party seeking the appropriate remedies for breach of contract. In truth, it is impossible for a contract that had been terminated to remain in some 'frozen' state waiting for some other event to happen that might be found to have kept it alive. Neither was there any legal basis for the alleged 'revival' or 'keeping alive' of the SPA.

Answers to the liability questions

[92] In consequence, our answers to the liability questions are as follows:

(a) answer to Question 5: In the affirmative. The case of *P Palakrishnan a/l Perianan lwn Krishnamoorthy a/l Sinniah dan satu lagi* was decided per incuriam;

(b) answer to Question 6: Clause 12 of the SPA suffices and stands as an automatic termination clause;

(c) answer to Question 7: We decline to answer, as it is posed without reference to the provisions of the SPA or the facts of the case; and

(d) answer to Question 8: In the negative. The SPA was not kept alive or revived nor has the plaintiff waived its right to terminate the SPA.

[93] So far we have dealt with the issues pertaining to the liability questions. We conclude that the defendant only paid 10% deposit of the purchase price and failed to pay the balance of the purchase price even though obliged to do so under the SPA. As correctly decided by the High Court and the majority of the Court of Appeal, the plaintiff had, in our judgment, validly terminated the SPA.

[94] This brings us to the relief questions.

The relief questions

(a) Unjust enrichment and restitution

[95] To a large extent, this issue deals with the restitution that the defendant claims it is entitled to, over and above the costs of construction of the mall, under the law of unjust enrichment. In essence, the defendant claimed that it should also be awarded for the improvement and enhancement it made to the land. In its amended defence and counterclaim, the defendant among others pleaded that by building the mall at the costs of RM124m it had greatly enhanced the value of the land; in no event should the plaintiff be allowed to reap a windfall at the expense of the defendant and that the plaintiff was not entitled to be unjustly enriched. In consequence, it was further pleaded, the land with the completed mall should be independently valued, and full credit be given to the defendant on the ground that it would constitute an unjust enrichment for the plaintiff to receive the mall without paying any adequate consideration for it.

[96] In addressing this crucial issue, the following points have already been made earlier but deserved to be reiterated. The SPA was somewhat unconventional in that it specifically allowed the defendant immediate access to the land and the right to carry out construction of a commercial development on the land upon execution of the SPA and well before the completion of the SPA. In addition, a PA was also granted to the defendant which allowed the defendant to perform all acts and deeds in relation to the land as a registered owner could. The plaintiff was aware that the defendant wanted to buy the land for the purpose of constructing and completing the mall and be ready for business before Chinese New Year of 2007. The defendant's rights to commence, continue and complete construction of the mall on the land was separate from and independent of the delivery of vacant possession of the land. Even with the ongoing litigation between the defendant and the plaintiff, the defendant carried on with the construction of the mall on the land as the defendant took the position that it was entitled to do so under the SPA and the PA. The plaintiff did not seek any interim injunctive relief to restrain the defendant from carrying substantial construction works prior to and/or after the completion date of the SPA of 21 March 2006. By the time the High Court delivered its decision on 11 November 2011, the mall had been fully operational for more or less a period of five years since its completion in early January 2007.

[97] It is against the above background, learned counsel for the defendant contended that the majority of the Court of Appeal in making an order for the return of the land and the mall (together with the business now ongoing therein) and to only compensate the defendant for the construction costs of the

mall would enrich the defendant to a tune of at least RM263m. The submission of learned counsel was that this draconian award and benefit to the plaintiff amounts to 'punitive damages' at its highest level. He added that the plaintiff should not be allowed to reap a windfall at the expense of the defendant and that the plaintiff was not entitled to be unjustly enriched. The main thrust of learned counsel's contention was that the majority of the Court of Appeal erred in failing to decide the appeal in a just and equitable manner and instead created a manifestly unfair result by virtue of a failure to fully judicially appreciate that what was required to be returned to the plaintiff was not the land that the plaintiff had sold to the defendant, but a physical building of a mall constructed by the defendant (with its own costs of RM124m), and a vastly enhanced asset in the form of the business of a shopping mall, which enhancement was done through the sole effort and at the sole costs of the defendant. He also put forward a submission that the majority of the Court of Appeal in holding the defendant to be a contract-breaker paid inadequate attention to the unconscionable conduct of the plaintiff. He drew particular attention to the fact that neither the High Court nor the majority of the Court of Appeal considered the fact that the plaintiff at no time took any steps to revoke the SPA or revoke the PA given to the defendant. And he also drew our attention to the fact that the High Court and the majority of the Court of Appeal also did not take into consideration that the plaintiff did not obtain an injunction to stop the defendant from constructing the mall after the alleged breach of contract at the relevant period in question. Learned counsel concluded his submission by contending that the proper relief to be granted would be the market value of the mall excluding any appreciation in land value not attributable to the mall expressed in the following equation: Current market value of the land with the mall – Current market value of the land without the mall = Compensation to the defendant.

[98] The pivotal position that the defendant sought to advance in this appeal was that the remedy that should be awarded to the defendant would be the full market value of the mall and not just the costs of construction of the mall.

[99] On the other hand, learned counsel for the plaintiff submitted that the question revolving around the law of unjust enrichment was linked to the fact that the defendant was the contract-breaker and at all times the defendant should not profit from its breach. This was specifically what the defendant sought to do by asking that it be compensated for the current enhanced value of the land. By that it was indirectly seeking a sum higher than the balance of the purchase price it owed and the value of the land at the time the SPA was executed. Thus at the end of the day, learned counsel for the plaintiff submitted, the entry into the contract and the breach of the contract by the defendant became a profitable commercial outing for the defendant. This, to quote learned counsel for the plaintiff 'is quite intolerable in equity'.

[100] To support his contention that the then Supreme Court had also previously dealt with the doctrine of unjust enrichment, learned counsel brought to our attention the case of *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1987] 2 MLJ 57. There, the respondents brought an action to claim from the appellants repayment of loans of US$25,000 and US$100,000. It was alleged that the sums were paid the appellants by bank drafts. The appellants denied requesting the respondents for the sums by way of loan or that they had agreed or promised to repay them. They further said that if the said sums were remitted by the respondents to the appellants they were not for the benefit of the appellants but for the use or benefit of Mosbert Finance (Hongkong) Ltd. or other persons or companies. The learned judge gave judgment in favour of the respondents under the heading of loans and s 71 of the Contracts Act 1950. The appellants appealed. In dismissing the appeal, the Supreme Court held that the trial judge had rightly given judgment under the headings of loan and s 71 of the Contracts Act 1950 and had considered that all the four conditions in s 71 of the Contracts Act 1950, had been satisfied and the respondents had therefore established their claim under the said section.

[101] We have read with care the judgment of *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)*. With respect we note that the Supreme Court made no reference to the law of unjust enrichment. A closer reading of the judgment will show the Supreme Court in that case decided the appeal entirely on the basis of the provisions of s 71 of the Contracts Act 1950 and not based on the law of unjust enrichment as we understand it today.

[102] Learned counsel then argued that the issue relating to the law of unjust enrichment was to be determined by looking, among others, at the following conduct and motives of the defendant:

(a) the defendant was aware as early as 9 March 2006 that if it breached the SPA, the plaintiff will require the return of the land;

(b) the construction of the mall on the land was at that time at a very preliminary stage (beginning of piling works) in March 2006. Thus, upon receiving the notice from the plaintiff's solicitors on 9 March 2006 the defendant could (and should) have ceased construction;

(c) after the expiry of the defendant's completion date of 31 August 2006 the defendant ignored the plaintiff's demand for it '... to cease all construction works so as to avoid increasing the size of the structure to be demolished in the future when the land is returned to our client ...';

(d) the plaintiff also commenced its action for vacant possession of the land on 28 August 2006 and on 10 October 2006 obtained O 14A judgment

directing the defendant to return possession to the plaintiff. The defendant continued the building with increased speed inspite of this order;

(e) the defendant knew that if the court ultimately decided in the plaintiff's favour, the end result would be that the land would have to be returned to the plaintiff. To preempt any court decision, the defendant 'rushed' the construction of the mall; and

(f) when the defendant failed to pay the 90% balance purchase price on 1 May 2006 it breached the SPA and it could not continue to exercise its rights under the PA to continue with construction of the mall.

[103] It has to be emphasised that the fundamental position taken by the plaintiff was that at the relevant time the defendant was a trespasser and if the defendant was entitled to any award for improving the land it could only be for the costs of the construction of the mall. In the result, learned counsel for the plaintiff submitted that the defendant should not be entitled to anything more than the costs of construction of the mall as ordered by the High Court and the majority of the Court of Appeal. Learned counsel relied on the case of *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17 and *JS Bloor Ltd v Pavillion Developments Ltd* [2008] EWHC 724 to support the following propositions:

(a) unless the land owner has acted improperly or unconscionably in some way, the land occupant or trespasser will have no remedy; and

(b) the land occupant or trespasser who has only himself to blame for incurring the expenditure has no remedy.

[104] As we shall see later in this judgment, based on the law of unjust enrichment as we apply today, the above contentions of learned counsel for the plaintiff are not free from difficulties.

[105] The majority of the Court of Appeal expressed their conclusion that the award should be limited to the costs of construction of the mall in the following passage:

> Her Ladyship did not provide any reasons why Her Ladyship only ordered for the compensation to take the form of the costs of construction and not the market value of the mall in Her Ladyship's judgment of 11 November 2011. We were initially inclined to substitute the learned judge's order with an order that the respondent pay the market value of the mall. Our inclination to do so was influenced by the fact that the appellant had good reason to complete the building in a hurry. This reason being the need to complete the construction before Chinese New Year in early 2007. However, on a careful consideration of the implications of such an order, we are persuaded that the order made by the learned judge that the compensation be limited to the costs of construction is the proper order to be made in all circumstances of this case. In our opinion, the market value of the mall is

inextricably linked to the value of the land. As such, in our judgment, to make an order for the respondent to pay the market value of the mall would effectively enable the appellant to benefit from any appreciation in the value of the land notwithstanding being the contract-breaker. Accordingly, to order compensation based on market value would, with respect, amount to allowing the contract-breaker to benefit for his wrong. This would be contrary to the pronouncements of the Federal Court in its judgment in *Berjaya Times Square v M Concept Sdn Bhd.*

[106] The passage above raises some vexed issues. On this, we have two observations. The first is that the majority of the Court of Appeal used the term 'compensation' in relation to the relief granted to the defendant. With respect, that term is inaccurate in the context of the right to restitution based on the law of unjust enrichment. As stated by *Goff & Jones on The Law of Unjust Enrichment* (8th Ed), (para 4-01), 'the law of unjust enrichment is concerned with transfers of value between claimants and defendants, and a claim in unjust enrichment is 'not a claim for compensation for loss, but for recovery of a benefit unjustly gained by a defendant at the expense of the claimant". In this way, the usage of the term 'restitution' should be contrasted with the term 'compensation'. The second observation is that it appears the majority of the Court of Appeal was persuaded by the dicta in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 to the effect that a contract-breaker should not benefit for his wrong. However the majority of the Court of Appeal failed to take into consideration that in that case the court also observed that first, a court interpreting a private contract was not confined to the four corners of the document. It was entitled to look at the factual matrix forming the background to the transaction. Secondly, the factual matrix which formed the background to the transaction included all material that was reasonably available to the parties. Thirdly, the interpreting court must disregard any part of the background that was declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract.

[107] We pause here for a moment to underline the significance of the law of unjust enrichment in relation to all the rights of the parties to a contract which has been validly terminated. The critical issue that needs to be addressed is what constitutes unjust enrichment and undue benefit, and in what manner should a purchaser of vacant land be granted restitutionary relief when he has constructed a building on the said piece of land pursuant to and expressly permitted by a contract between him and the vendor. In our view, the following issues are important to determine the outcome of this appeal. Is it fair and equitable for the purchaser upon the termination of contract to be awarded only the cost of construction of the building, in this case the mall, or the market value of the mall?

[108] This is a good place to point out that remedies for contractual disputes are generally compensatory in nature, with damages assessed based on the loss suffered by the claimant. Restitutionary remedies, on the other hand, focus on any unjust enrichment to a party at the claimant's expense. It is aimed of restoring that enrichment to the claimant. It is clear on principle and on authority that the idea of justice behind this aim is that no one should be made richer through loss to another.

[109] In *Goff & Jones on The Law of Unjust Enrichment*, para 1-08, it is stated:

> Whatever may be the underlying moral justifications for the award of restitution all these cases, the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution'. In other words, unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases, it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit that is gained at the claimant's expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and in this respect the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying the single principle that expectations engendered by binding promises must be fulfilled).

[110] Restitution simply means that a party who has received a benefit must restore the benefit received by him. The theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment which fall outside the domains of contract and tort. The law of contract/tort and the law of unjust enrichment are conceptually distinct. Unjust enrichment describes a cause of action. On the other hand restitution describes a remedy. Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment (see *Goff & Jones on The Law of Unjust Enrichment* para 1-04). The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment.

[111] As stated by Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p 61:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derive from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

[112] Since then English law has recognised an independent law of unjust enrichment by recognising a claim for restitution based on unjust enrichment. According to *Goff & Jones on The Law of Unjust Enrichment* (see para 1-05), the highest courts have now conclusively recognised that unjust enrichment is a distinct source of rights and obligations in English private law that ranks alongside contract and civil wrongs in importance and accordingly calls for discrete stand-alone treatment. This was shown in a number of cases which were cited by learned counsel for the defendant, namely *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221, *R (on the application of Rowe) v Vale of White Horse District Council* [2003] EWHC 388 (Admin), *Cressman v Coys of Kensington* [2004] EWCA Civ 47; [2004] 1 WLR 2775, *Chief Constable of Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449; [2009] 1 WLR 1580, *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2008] 1 AC 561 and *Investment Trust Companies (in Liquidation) v Revenue and Customs Comrs* [2012] EWHC 458 (Ch D).

[113] We need not go through all the cases here. We would only draw attention to two decisions of the House of Lords. First, the important case of *Banque Financiere de la Cite v Parc (Battersea) Ltd*. We think it is helpful if we give an account of the background facts of this case. In 1988 Parc obtained a bank loan from Royal Trust Bank (Switzerland) ('RTB') in order to purchase a development property. The loan was secured by a debenture containing a first legal charge over the property. Omincorp Overseas Ltd ('OOL') had a second legal charge over the property as security for another debt. Both Parc and OOL were companies within the same group. In 1990, Herzig, the general manager of the group's holding company, negotiated a refinancing loan with Banque Financiere de la Cite ('BFC'), for the purpose of enabling Parc to reduce the outstanding balance of the loan from RTB. In order to avoid BFC's obligations under Swiss federal banking regulations, the transaction was restructured by interposing Herziq as the immediate borrower, and he then paid the money to Parc, who used it to pay part of RTB's loan. Parc provided no security for the BFC's loan, but BFC obtained an assignment from Herziq of a promissory note for the relevant sum given to him by Parc, and a 'postponement letter', signed by Herziq, stating that all companies in the group would not demand any repayment of loans made to Parz until BFC's loan to Herziq had been repaid in full. Both Parc and OOL were unaware of the existence of the letter. The group of companies collapsed in 1991, and Parz became insolvent. BFC obtained judgment against the Parz for the sum due on the promissory note plus interest. OOL also obtained judgment against Parc and contended that their debt took priority by reason of the second charge. BFC relied on the postponement letter to claim priority over OOL. The trial judge ruled that, although the letter was not binding on Parc and OOL because they did not know of it, they nevertheless knew enough to permit a presumption of the mutual intention which was necessary to activate the remedy of subrogation so as to prevent OOL from being unjustly enriched at the BFC's expense. The Court of Appeal

reversed that decision on the grounds, inter alia, that subrogation would give the BFC's rights for which they had never bargained, namely the rights of a first mortgagee, and would place them in a more favourable position than if the letter had been binding. In allowing BFC's appeal and restoring the order of the trial judge, the House of Lords held that availability of subrogation as a restitutionary remedy, unlike contractual subrogation, did not depend on the intention of the parties.

[114] In the context of our present case, the key part of the judgment is the speech of Lord Steyn as follows:

> My Lords, both the judge and Morritt LJ invoked the vocabulary of unjust enrichment or restitution. Nevertheless both courts ultimately treated the question at stake as being whether BFC is entitled to be subrogated to the rights of RTB. On the present appeal counsel adopted a similar approach. That position may have seemed natural at a stage when BFC apparently claimed to be entitled to step in the shoes of RTB as charge with the usual proprietary remedies. On appeal to Your Lordships' House counsel for BFC attenuated his submission by making clear that BFC only seeks a restitutionary remedy against OOL. In these circumstances it seems sensible to consider directly whether the grant of the remedy would be consistent with established principles of unjust enrichment. OOL committed no wrong; it cannot therefore be a case of unjust enrichment by wrongdoing. If it is a case of unjust enrichment, it must in the vivid terminology of Professor Peter Birks, *An Introduction to the Law of Restitution* (1985), be unjust enrichment by subtraction. If the case is approached in this way it follows that BFC is either entitled to a restitutionary remedy or it is not so entitled. After all, unjust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations. Four questions arise. (1) Has OOL benefited or been enriched? (2) Was the enrichment at the expense of BRC? (3) Was the enrichment unjust? (4) Are there any defences? The first requirement is satisfied: the payment of £10m of the loan pro tanto improved OOL's position. That is conceded. The second requirement was in dispute. Stripped to its essentials the argument of counsel for OOL was that the interposition of the loan to Mr Herzig meant that the enrichment of OOL was at the expense of Mr Herzig. The loan to Mr Herzig was a genuine one spurred on by the motive of avoiding Swiss regulatory requirements. But it was nevertheless no more than a formal act designed to allow the transaction to proceed. It does not alter the reality that OOL was enriched by the money advanced by BFC via Mr Herzig to Parc. To allow the interposition of Mr Herzig to alter the substance of the transaction would be pure formalism.
>
> That brings me to the third requirement, which was the ground upon which the Court of Appeal decided against BRC. Since no special defences were relied on, this was also the major terrain of debate on the present appeal. It is not seriously disputed that by asking for a letter of postponement BRC expected that they would obtain a form of security sufficient to postpone repayment of loans by all companies in the Omni Group until repayment of the BRC loan. In any event, that fact is clearly established. But for BRC's mistaken belief that it was protected in respect of

intra-group indebtedness BRC would not have proceeded with the refinancing. In these circumstances there is in my judgment a principled ground for granting a restitutionary remedy.

[115] To similar effect is the speech of Lord Clyde:

> My Lords, the basis for the appellants' claim is to be found in the principle of unjust enrichment, a principle more fully expressed in the Latin formulation, *nemo debet locupletari aliena jactura*. The principle is equitable in the sense that it seeks to secure a fair and just determination of the rights of the parties concerned in the case. But it is not a principle which is entirely discretionary in its application so as to enable a court in any case to withhold a remedy where all the necessary elements for its satisfaction have been established, although there may be circumstances where on grounds which may be described as grounds of public policy a remedy may be refused. Without attempting any comprehensive analysis, it seems to me that the principle requires at least that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss. The loss may be an expenditure which has not met with the expected return. The remedy may vary with the circumstances of the case, the object being to effect a fair and just balance between the rights and interests of the parties concerned. The obligation to provide the remedy does not rest on any contractual basis but on the general principle of the common law and it may find its expression in a variety of circumstances.

[116] The second House of Lords case is equally important. It is the case of *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2008] 1 AC 561. For our present purpose, it is not necessary to narrate the facts of the case. What is of importance is the elucidation by Lord Hope on the basis of the restitutionary award in the following passage:

> I turn then to the basis on which the restitutionary award should be calculated. In *Shilliday v Smith* 1998 SC 725 at p 727, Lord President Rodger said that anyone who wants to glimpse something of the underlying realities in the law of unjust enrichment must start from the work of Professor Peter Birks. In the essay which he contributed to *Restitution, Past, Present and Future, Essays in Honour of Gareth Jones* (1998), Misnomer, p 1, Professor Birks said that the whole thrust of the law of restitution is towards defining and analysing the event which most commonly brings it about, which is unjust enrichment. Restitution is the response to unjust enrichment, and unjust enrichment is the event which triggers the response. The name of the event ought to predominate over the response. So, he argued, the subject ought to be called unjust enrichment. That is the starting point and, because the concept is one of enrichment not of damages, it determines the nature of the response.
>
> In his introduction to the book which he called *Unjust Enrichment* (2nd Edition, 2005) pp 3–4, he drew attention to another terminological difficulty. He explained that the law of restitution is the law of gain-based recovery, just as the law of compensation is the law of loss-based recovery:

> Thus a right to restitution is a right to a gain received by the defendant, while a right to compensation is a right that the defendant make good a loss suffered by the claimant. The word 'restitution' is not entirely happy in this partnership with 'compensation'. It has had to be manoeuvred into that role. 'Disgorgement', which has no legal pedigree, might be said to fit the job more easily and more exactly.
>
> So the remedy of restitution differs from that of damages. It is the gain that needs to be measured, not the loss to the claimant. The gain needs to be reversed if the claimant is to make good his remedy.

[117] The above passages from the judgments of the House of Lords are instructive and are significant contribution to the development of law of unjust enrichment. The principle underlying the cases of *Banque Financiere de la Cite v Parc (Battersea) Ltd* and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:

(a) the plaintiff must have been enriched;

(b) the enrichment must be gained at the defendant's expense;

(c) that the retention of the benefit by the plaintiff was unjust; and

(d) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

[118] Nearer home, there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229 and in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59. Nevertheless, it has to be said that despite the increase in judicial reference to the expression of unjust enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled 'An Introduction to the Law of Unjust Enrichment' [2013] 5 MLJ i by Alvin W-L See). In our view, the time has come for this court to recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice.

[119] Applying those principles, we now turn to consider whether the defendant has made out a cause of action in unjust enrichment: the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, that the plaintiff's enrichment at the defendant's expense was unjust, and whether there are any special defences to the claim.

[120] We will consider each of the requirements in turn. But first it must be noted that no special defence was relied on by the plaintiff; in that sense the fourth requirement was not in dispute.

Was the plaintiff enriched

[121] Benefits are only capable of generating claims in unjust enrichment if they have monetary value (see *Goff & Jones on The Law of Unjust Enrichment* para 4-03). In this regard, it is important to point out that what is required to be returned to the plaintiff is not the land that the plaintiff had sold to the defendant, but an enormously enhanced and improved asset in the form of the business of a mall, which unquestionably have a monetary value. One important fact requires to be kept in mind. The mall, has been a thriving mall with an occupancy rate of more than 80% tenanted with over 250 retail outlets, operating for the past seven years since its completion in December 2006.

[122] It cannot be disputed that the market value of the mall far exceeds that of the value of the land. As submitted by learned counsel for the defendant, if the mall were to be sold to a third party, the unjust enrichment and undue benefit accrued to the plaintiff would be enormous. At its very worst, the land if left empty or vacant would not have appreciated considerably. This in itself would enrich the plaintiff with a windfall of a fully occupied and vibrant mall with tenants on the land resulting in undue enrichment far in excess of the contractual price of the land.

[123] The plaintiff has unquestionably benefited even though it did not request for the mall to be constructed. But the mall was not constructed and maintained by the defendant to benefit the plaintiff gratuitously. The plaintiff does not seek the aid of the court to pull down the mall. The plaintiff undoubtedly is now in a position to have the benefit of a completely constructed mall. The construction of the Mall is indeed an objective enrichment to the plaintiff. The plaintiff would receive a massively enhanced asset and this adds to its enrichment. The mall is an indisputable benefit to the plaintiff. Therefore, we conclude that the first requirement is satisfied.

Was the enrichment at the expense of the defendant

[124] The defendant did not only construct a building, or merely constructed a property on land. The defendant had built and continues to build an entire enterprise, brand name, goodwill encompassing all that is known as the mall. But more than that, the defendant's bona fide improvement and enhancement of the land, namely by obtaining permission, building plan approval and constructing the mall were all done entirely through the sole act and effort and

at the sole costs of the defendant. By reason of the defendant constructing the mall at its own costs on the land, it had substantially enhanced in value.

[125] In this regard, we have given our utmost consideration of the two cases relied on by learned counsel for the plaintiff, namely *Blue Haven Enterprises Ltd v Tully* and *JS Bloor Ltd v Pavillion Developments Ltd* to point the difference of that cases from the case before us. In the present case the majority decision of the Court of Appeal made a finding that the construction in itself was lawful and that the defendant had a legal right to continue the construction of the mall pending the final determination of the suit herein in the High Court as the PA was not terminated. Moreover, apart from issuing a single letter dated 18 October 2006 to ask that the defendant cease all construction work on the land, the plaintiff took no other action to stop the defendant from constructing on the land. The plaintiff at no time took any steps to revoke the PA given to the defendant. The plaintiff did not obtain an injunction to stop the defendant from constructing the mall after the alleged breach of contract at the relevant period in question.

[126] The defendant had embarked upon the promotion of the mall and was responsible for the overall running, upkeep and maintenance of the building, road and infrastructure as well as the general administration of the mall. The defendant had expended time, effort, expertise and all at its own costs in establishing and maintaining the business venture known as the mall to the stature and success it had reached to date. This involved extensive and continuous marketing and promotional strategies since the inception of the mall.

[127] In our judgment, the enrichment or benefit of the plaintiff was undoubtedly at the expense of the defendant.

Was the enrichment unjust

[128] The most important question which we must now asked is whether it is unjust for the plaintiff to retain to the benefit (the unjust question). The English approach to the unjust question is to ascertain an unjust factor such as, for example, mistake or failure of consideration. This differs with the civilian approach to the unjust question which consider whether there is a lack of juristic basis. *Goff & Jones on The Law of Unjust Enrichment*, para 1-11, explained these two approaches as follows:

> Many civilian and mixed law systems have a law of unjustified enrichment, under which a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense and that there was no legal ground for the defendant's enrichment. Under these systems a defendant can escape restitutionary liability by showing that there was a legal ground for his enrichment, for example because the

claimant was required to benefit the defendant by statute or by contract. The reason why there is no liability in these circumstances is that the defendant's enrichment is not unjustified and so the claimant has no prima facie right to restitution.

The English law of unjust enrichment frequently produces the same results as the law of civilian and mixed law systems, but it works in a different way. Under English law, a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense, and that the circumstances are such that the law regards this enrichment as unjust. For example, a claimant will have a prima facie right to restitution where he has transferred a benefit to a defendant by mistake, under duress, or on a basis that fails. Nevertheless, the defendant can escape liability if another legal rule entitles him to keep the benefit, and this rule overrides the rule generated by the law of unjust enrichment which entitles the overrides the rule generated by the law of unjust enrichment which entitles the defendant to restitution. For example, a claimant may have paid money to a defendant by mistake, but even so, the payment may be irrecoverable if the claimant was required to pay the money by a statute or by a contract previously entered by the parties. Although the claimant would otherwise have a claim in unjust enrichment, the defendant's enrichment is justified by the statute or contract.

[129] We would adopt 'the absence of basis' (to borrow the term used by *Goff & Jones on The Law of Unjust Enrichment* para 1-19) approach of the civilian and mixed law systems for the reason that, in our view, it would produce a fairer outcome. Applying this approach, the plaintiff can escape restitutionary liability by showing that there was a legal ground for receiving an enormously enhanced and improved asset in the form of the business of a shopping mall. The important point to note here is that the defendant was not required to benefit the plaintiff by legislations or by contract. In our judgment the reason why there is liability in these circumstances is that the plaintiff's enrichment is unjustified and that there is no legal ground for the plaintiff to claim and enjoy the full commercial value of the mall. Therefore, the defendant has a prima facie right to restitution.

[130] On the factual matrix of the present case, in our judgment, injustice has occurred to such an extent that the defendant has not only suffered a loss, but the plaintiff is at the same time made richer by the defendant's loss by the same amount. On that note, the point to make here is this. This sense of injustice at the defendant's expense is central to the foundation of the relief of restitution based on the law of unjust enrichment. The plaintiff should not be allowed to reap the windfall at the expense of the defendant. The defendant lawfully constructed the mall on the land not intending to do so gratuitously with the plaintiff enjoying its benefit. On this basis, it warrants judicial intervention as a legal response triggered by an unjust enrichment in the fact situation of the present case.

[131] To conclude, we hold that the defendant had made out a cause of action in unjust enrichment in that the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, and that the plaintiff's enrichment was unjust.

[132] The following critical question then arises: what proper remedy should be awarded to the defendant? On the remedy issue, it is instructive to refer again to *Goff & Jones on The Law of Unjust Enrichment* para 36-02, where it is stated:

> In every case where a defendant is unjustly enriched at a claimant's expense, English law gives the claimant a right to restitution from the defendant. The courts sometimes use the word 'restitution' to describe a measure of compensation for civil wrongdoing, and when it is used in this sense the word means 'restoring the claimant to the position he occupied before he was caused a loss by the defendant's wrong'. In this context, however, the word 'restitution' means something different, namely 'restoring the value received by the defendant to the claimant'. There is an obvious danger of confusion here, and these two meanings of the word must be kept separate. As Lord Hope said in *Sempra Metals Ltd v IRC*, 'the law of restitution is the law of gain-based recovery, just as the law of compensation is the law of loss-based recovery' and 'the remedy of restitution differs from that of damages. It is the gain that needs to be measured, not the loss to the claimant. The gain needs to be reversed if the claimant is to make good his remedy'.

[133] In this regard, learned counsel for the defendant referred to a line of Australian authorities which support the proposition that the proper award to the defendant in the present case is the extent which the value of the land has been enhanced. In *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446, the plaintiff was the purchaser of a building for $11,500,000. It duly paid a total $4,500,000. Upon the extended date for completion, the plaintiff defaulted in payment of the balance purchase moneys and other moneys due under the contract as varied. On that date the defendant vendor served on the plaintiff a notice in purported compliance with s 72 of the Property Law Act 1974. It referred to the plaintiff's default in payment of $7,000,000 balance purchase price and of a further $1,784,001.40 due under provisions of the contract and a deed of variation. It then added 'you defaulted in payment of any other monies payable pursuant to' the contract and the deed. It then gave notice that, unless within 30 days of service of the notice 'you pay or tender to (the vendor) the sum of $8,784,001.40, being the amount of the said instalment and other monies payable as aforesaid, together with any other monies payable pursuant to' the contract and deed, the contract as varied by the deed would be determined without further notice. There were no other monies than the sum of $8,784.001.40 payable. The court declared the contract between the plaintiff and the defendant was validly rescinded. McPherson J stated the following in regard to the principles relating to the adjustment of the rights between the parties upon discharge of a contract for the sale in relation to

improvements:

> In addition, the purchaser is entitled to restitution in respect of permanent improvements made to the land while in his possession to be measured by the extent to which the value of that land has been enhanced ...

[134] The approach in *Lexane Pty Ltd v Highfern Pty Ltd* in awarding the value of the enhancements made to the land was affirmed as correct in *Stern v McArthur* (1988) 165 CLR 489. These cases are relevant and persuasive in deciding the proper remedy to be awarded to the defendant in the present case.

[135] Having regard to the factual matrix and the prevailing circumstances, in our view the High Court and the majority of the Court of Appeal failed to judicially appreciate that the amount of unjust enrichment gained by the plaintiff is the ultimate value of the land as a result of the defendant's improvement and enhancement. The High Court and the majority of the Court of Appeal were wrong in failing to properly and judicially appreciate that the amount of unjust enrichment was not the mere costs of constructing the mall but that the amount of the unjust enrichment was for all intents and purposes the value of the enhancement or enrichment as a whole encompassing of improvement and enhancement of the land, namely by obtaining planning permission, building plan approval, design and conceptual development, business modelling and constructing at the defendant's own costs, effort and experience, upon the land a shopping mall which subsequently was tenanted with an ongoing business, goodwill and brand name.

[136] By reason thereof, it will remain manifestly unfair and unjust for the plaintiff to be enriched to the extent of the full commercial value of the mall, while having only to pay for the costs of its physical construction to the defendant. On authority as well as on principle, in our judgment, the defendant is, on those facts, entitled to a monetary award in the sum equivalent to the current market value of the mall excluding the market value of the land without the mall. As can be seen, the consequence of our order is that after paying the said monetary sum to the defendant, the plaintiff would from then on enjoy the full benefit of a completely constructed mall on the land, which we were informed in the course of the submissions before us, has a freehold title. This would unquestionably place the plaintiff in a far better position than it would have been had the plaintiff not entered into the SPA with the defendant.

(b) Liability to account for profits

[137] The plaintiff took the position that the defendant as a contract-breaker has to give an account of the profits that it has made as a result of being on the land and in control of the same.

[138] On the other hand, the stand of the defendant was that for its occupation on the land, the appropriate measure of relief is for market rent for the use of the unimproved land and nothing more.

[139] As stated earlier, the majority of the Court of Appeal clarified the order relating to the accounts of profits ordered by the High Court and held that the defendant is only to pay the profits derived from its use and occupation of the land, in accordance to the principles in *A-G v Blake (Jonathan Cape Ltd third party)* [2001] 1 AC 268. As in the High Court and the Court of Appeal, before us, learned counsel for the plaintiff placed heavy reliance on that case and further submitted that this was a case that fell within the category of 'exceptional cases of breach of contract' that Lord Nichols spoke of in *A-G v Blake* where an account of profits could be ordered. Learned counsel for the plaintiff submitted that a determination of this issue must be grounded on a consideration of the improper conduct of the defendant in constructing the mall and, further, in improperly creating third party rights on the land after the SPA was terminated. It is his submission that an innocent party in a sale and purchase agreement was entitled to accounts for profits obtained by the defaulting party who was in breach of the agreement.

[140] Since heavy reliance is placed by the plaintiff on *A-G v Blake*, it is very important to appreciate the facts of the case in order to understand the significance of the context in which the order to account for profits were made by the House of Lords. Blake was employed as a member of the security and intelligence services for 17 years, from 1944–1961. In 1951, he became an agent for the Soviet Union. From then until 1960, he disclosed valuable secret information and documents gained through his employment. In 1961 he pleaded guilty to five charges of unlawfully communicating information contrary to the Official Secrets Act 1911 and was sentenced to 42 years' imprisonment. That case revolved around the autobiographical writings of Blake, a notorious spy. Certain sums of money were to be paid in stages to Blake as royalty. What had happened was that the Crown (which was the former employer of Blake) sought to stop the final payment and sought an order for it to instead be paid to the Crown. Court proceedings were brought by the Crown both in public and private law which included among others a claim in breach of confidence. Whilst the claim in private law failed, the claim in public law was successful and the Crown was successful in obtaining an order for payment so as to prevent Blake from receiving money whilst being in breach of the Official Secrets Act 1989. On the point that an innocent party in a sale and purchase agreement was entitled to accounts for profits obtained by the defaulting party who was in breach of the agreement, Lord Nicholls said:

> My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression 'restitutionary damages'. Remedies are the

law's response to a wrong (or, more precisely to a cause of action). When exceptionally a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.

[141] In the later part of his speech, Lord Nicholls emphasised that an account of profits as a remedy for breach of contract will be suitable only in exceptional circumstances:

The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, in practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance, and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise.

[142] Three points must be noted here. The first is that as can be seen from the very outset the order to account for profits in *A-G v Blake* was in itself unusual due to the peculiar nature of the case. The House of Lord felt strongly that a self-confessed traitor should not benefit from his crime. Secondly, it must be taken into account of the fact that the remedy sought for an account of profits was only awarded as the Crown's other causes of action and normal remedies seemed inadequate in light of the conduct of Blake. Thirdly, Lord Nicholls made it quite clear that an account of profits was only to be made in exceptional cases where and only if normal remedies are inadequate. The Crown in that case could not prove any loss under the usual compensatory measures, hence the order to account was made therein.

[143] In our judgment the case of *A-G v Blake* should be distinguished on its facts. We agree with the submission of learned counsel for the defendant that the majority of the Court of Appeal failed to consider adequately that the facts of the present case were clearly within the ambit of an alleged breach of contract under which other remedies for the alleged breach of the SPA are readily available. We noted that apart from stating that the facts of *A-G v Blake* were exceptional, the majority of the Court of Appeal failed to justify such a finding. It is quite plain to us that the present case revolved around an alleged breach of contract and there was nothing exceptional about it. It was a purely commercial

undertaking that is common in the business world. Hence, we agree with the submissions of learned counsel for the defendant to the effect that the principle under which the order or relief was made in the *A-G v Blake* is inapplicable to the facts of this case. For that reason, the majority of the Court of Appeal fell into error in applying *A-G v Blake* in making an order for an account of profits in favour of the plaintiff. This was plainly wrong.

[144] Likewise, in our view, the majority of the Court of Appeal erred in failing to recognise that to make an order for an account of profits, it will have to be shown by the plaintiff that the profits were brought about by breach of contract. In the present case, the defendant would have made these profits had it paid the purchase price in time so that the SPA would have been concluded. Viewed in this way, they are therefore not net profits gained by the breach of contract. There was therefore no justification in law or equity to grant the order for an account of profits against the defendant.

[145] On the question of whether the defendant was a trespasser and what relief the plaintiff should be entitled to for the defendant's occupation on the land, the majority of the Court of Appeal made the following crucial findings:

> In our opinion, the continued construction of the mall notwithstanding the respondent's order that the appellant refrain from doing so is nevertheless 'lawful', since the validity of the termination of the SPA was not settled until the decision of the High Court on 11 November 2011. Secondly, the PA continued to subsist not having been revoked by the respondent. The second condition is clearly fulfilled since the appellant continued the construction of the mall in the expectation of being successful in its claim for specific performance. It most certainly was not undertaken by the appellant to benefit the respondent gratuitously. Finally, since the respondent does not seek the assistance of the court to demolish the mall but has acquired possession of the land and the mall pursuant to the order of vacant possession, the respondent clearly is now in a position to enjoy the benefit of a completely constructed mall.

[146] In our judgment based on the findings made by the majority of the Court of Appeal above that the construction in itself was lawful, the defendant was, until the validity of the termination of the SPA was settled, in possession of a beneficial interest on the land capable of registration and was not a trespasser. The majority of the Court of Appeal, however, did not address the status of the defendant but instead proceeded to make an order for an account of profits and placed heavy reliance on the case of *A-G v Blake* even though, as we have held earlier, the principal stated in that case does not apply to the facts of the present case.

[147] The majority of the Court of Appeal also referred two cases of *Hayes v Ross (No 3)* [1919] NZLR 786 and *Martin v Finch* [1923] NZLR 570 in support of the proposition that the court ought to order the defendant to

account for the rental income and sale proceeds of the units constructed on the land.

[148] In *Hayes v Ross (No 3)*, the plaintiff, who had let the defendant into possession of land under an agreement for sale and purchase, sued for rescission of the contract on the ground of the failure of a substantial part of the consideration. The plaintiff also claimed for the defendant's use and occupation of the property, for its deterioration through his acts and omissions, and for the amount of commission paid to the agent who negotiated the sale. Judgment having been given for rescission of the agreement, it was, among others, held by the Supreme Court of New Zealand that the plaintiff was entitled to compensation in the nature of rent for the period of the defendant's occupation.

[149] In *Martin v Finch*, the plaintiff as vendor, and the defendant as purchaser, entered into an agreement for the sale and purchase of certain land. The plaintiff received a deposit of £100, and a further sum of £150 on account of the purchase-money. The defendant made such default under his contract as precluded him from demanding the transfer of the estate. He alone was responsible for the purchase not being completed. The plaintiff rescinded the agreement, and there was no resale. It was admitted that the sum of £150 would have to be paid back. The defendant went into the possession of the property shortly after the making of the contract, and he or his tenants continued in occupation up to the date of judgment. The Supreme Court of New Zealand held that the defendant had forfeited the amount of the deposit and the plaintiff was entitled to retain it. It was also held that that the plaintiff should get compensation in the nature of rent computed for the period during which the defendant had been in occupation of the property.

[150] Therefore, as submitted by learned counsel for the defendant, both the cases above do not support the proposition advanced by the majority of the Court of Appeal. On the contrary, both the cases actually ordered the defendant to pay the plaintiff compensation in the nature of rent for the period of the defendant's occupation and there were no accounting of profits awarded. With all respect, the majority of the Court of Appeal was patently wrong in applying the above cases in holding that the defendant was liable to account for profits derived from its use and occupation of the land.

[151] More significant still, as a matter of general principle, it is settled that relief for account for profits would only be awarded in instances where it is established that there has been a breach of fiduciary duty (see *Mohd Zain Yusoff & Ors v Avel Consultant Sdn Bhd & Anor* [2006] 6 MLJ 314, *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 and *Avel Consultants Sdn Bhd & Anor v Mohamed*

Zain Yusof & Ors [1985] 2 MLJ 209).

[152] In *Mohd Zain Yusoff & Ors v Avel Consultant Sdn Bhd & Anor* [2006] 6 MLJ 314, the Court of Appeal held:

> The main issue to be decided in this appeal by the appellants is whether the respondents are only entitled to profits, and not gross income derived by the appellants from their breaches. It is the appellants' case that the respondents are only entitled to profits and that the appellants should be allowed to make deductions for the expenditure incurred by them to earn the income. We are in agreement with the contention of the appellants and it is for this reason that this court had earlier ordered the SAR to take an account of the income and expenses incurred by the appellants and submit his findings to the court. On this point, we find support in the principle as applied in the Australian High Court case of *Warman International Limited & Anor v Brian Dwyer & 2 Ors* [1995] 2 CLJ 326. In that case, there was a breach of fiduciary duty by the general manager of the company ('the former employer') when he formed new companies to carry out the business of the former employer. The court, inter alia, held that in ascertaining the damages the former employer would be entitled, the appropriate order is for an account of profits of the business of the new companies before tax less an appropriate allowance for expenses, skill, expertise, effort and resources contributed by them.

[153] In the present case there was no fiduciary relationship between the defendant and the plaintiff. An order to account for profits is contrary to established principles of law where it is settled that relief for account for profits would only be awarded in instances where it is established that there has been a breach of fiduciary duty. This point was ignored by the majority of the Court of Appeal.

[154] Finally, we come now to the case of *Ministry of Defence v Ashman* (1993) 66 P & CR 195 relied by learned counsel for the defendant to contend that the defendant was entitled to subjectively devalue the compensation payable and/or benefits/profits gained or generated from the occupation of the land. We do not agree with this contention. In the first place, as pointed out by learned counsel for the plaintiff, the principles set-out in *Ministry of Defence v Ashman* follow on from earlier case, namely *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 where Megaw LJ approved a passage in *Halsbury's Laws of England* which stated:

> Where the defendant has by trespass made use of the plaintiff's and the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use. It is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason.

In another part of his judgment, Megaw LJ set-out the approach to be adopted by a court assessing damages for trespass as follows:

> The plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could nor would have let the property to someone else in the absence of the trespassing defendant to have as damages for the trespass the value of the property as it would fairly be calculated; and in the absence of anything special in the particular case, it would be the ordinary letting value of the property that would determine the amount of damages.

[155] Coming back to the case of *Ministry of Defence v Ashman*, the brief facts are that the Ashman family lived in the married quarters of the Ministry of Defence. This privilege was valid as long as Mr Ashman continued to stay in the quarters as he was an employee of the Ministry of Defence. In 1991, Mr Ashman left his family and moved out. However, the family continued to occupy the quarters as there was no alternative accommodation available. The Ministry of Defence commenced proceedings against Mrs Ashman seeking possession and mesne profits for trespass. Mrs Ashman subsequently got alternative accommodation, ie a flat, from the local authority which was let out at a substantial discount compared to market rate. Hoffman LJ held that Mrs Ashman would not have stayed in the quarters at market rate rent if she had a choice. Since being evicted from the quarters, she was able to get a flat from the local authority. As such, Hoffman LJ held the value of the quarters was no more than what Mrs Ashman would have had to pay for suitable local authority housing if this was available immediately.

[156] There are three points that must be noted here. First, as pointed out by learned counsel for the plaintiff, the principles as set-out in *Ministry of Defence v Ashman* were not raised in the High Court and the Court of Appeal. Secondly, the defendant did not provide any evidence about its 'subjective devaluation' analysis; and thirdly, *Ministry of Defence v Ashman* case is about residential property and the assessment of damages. The case involved the wife of an officer in the armed forces who was getting divorced, and whose husband had left her living as trespasser in married quarters. In that case, the English Court of Appeal was considering the issue of tenant of residential property that was paying a lower rent than charged commercially due to government subsidies.

[157] We therefore agree with the submissions of learned counsel for the plaintiff that the principle from the case of *Ministry of Defence v Ashman* is distinguishable and it is not applicable to the facts of the present case. The facts in that case were exceptionally different from the present case.

[158] In the present case, the special clause in the SPA and the PA gave the defendant immediate possession of the land upon payment of the deposit and allowing it to build the mall before the balance of the purchase price was paid.

More than that, the majority of the Court of Appeal itself made a finding that the defendant's conduct of continuing with its occupation of the land and constructing the mall was lawful. The irresistible deduction to be drawn is that had the defendant known that it did not have good title to the land, it would most certainly not have proceeded to spend large sums of money in improving the land by building the mall on it. In the circumstance, we conclude that the plaintiff is only entitled for the market rent of the unimproved land and not for an account of profits as held by *A-G v Blake*.

Answers to the relief questions

[159] In consequence, our answers to the relief questions are as follows:

(a) answer to Question 1: The defendant is not precluded from being awarded restitution pursuant to the law of unjust enrichment in respect of the defendant's improvement and enhancement of the land at the defendant's own costs, effort and experience;

(b) answer to Question 2: The measure of for unjust enrichment is the market value of the mall and it is not restricted to the costs of construction of the building;

(c) answer to Question 3: As there is no fiduciary relationship between the plaintiff and the defendant and since there are other normal measures of relief available, the defendant should not be required to account for profits;

(d) answer to Question 4: In the circumstances of this case, it is unnecessary to answer this question;

(e) answer to Questions 9: The defendant ought to pay the plaintiff calculated on the basis of market rent for the occupation of the unimproved land;

(f) answer to Questions 10: In the negative; and

(g) answer to Question 11: In the affirmative.

CONCLUSION

[160] Based on all the above mentioned reasoning, we hereby make the following orders:

(a) we allow the appeal in part by setting aside the orders of the High Court and the majority of the Court of Appeal that there be an assessment by the registrar of the High Court of the costs of the construction of the mall on the land incurred by the defendant and it is to be paid by the plaintiff to the defendant. We substitute it with an order that there be an assessment by the judge of the High Court of the current market value

of the mall, that is to say the value of mall on the date of this judgment, excluding the market value of the land without the mall on the said date, and that the monetary sums of the market value of the mall are to be paid by the plaintiff to the defendant;

(b) we also set aside the orders of the High Court and the majority of the Court of Appeal that the defendant is given an account of all the income received from the sale and rent on the land and profits obtained therefrom, and there be an assessment by the registrar of the High Court of profits made by the defendant on the land and it is to be paid to the plaintiff. We also set aside the order of the High Court that the defendant is a constructive trustee for all the income and profits received from the sale and purchase from the sale and rent on the plaintiff's land. We substitute it with an order that there be an assessment by the judge of the High Court on the market rent value for the defendant's occupation of the plaintiff's unimproved land until the date of this judgment, and it is to be paid by the defendant to the plaintiff;

(c) we order that vacant possession of the land with the mall to be so delivered by the defendant to the plaintiff only upon payment by the plaintiff to the defendant of the monetary sums so assessed pursuant to our order we make in (a);

(d) save for the orders we make in (a) and (b) we confirm all the orders made by the High Court and duly upheld by the majority of the Court of Appeal;

(e) we order the plaintiff to pay costs of this appeal to the defendant; and

(f) we order the deposit to be refunded to the defendant.

Order accordingly.

Reported by Ashok Kumar